

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

	x	
	:	
THE CITY OF HUNTINGTON,	:	Civil Action
	:	
Plaintiff,	:	No. 3:17-cv-01362
	:	
v.	:	
	:	
AMERISOURCEBERGEN DRUG	:	
CORPORATION, et al.,	:	
	:	
Defendants.	:	

	x	
	:	
CABELL COUNTY COMMISSION,	:	Civil Action
	:	
Plaintiff,	:	No. 3:17-cv-01665
	:	
v.	:	
	:	
AMERISOURCEBERGEN DRUG	:	
CORPORATION, et al.,	:	
	:	
Defendants.	:	

BENCH TRIAL - VOLUME 9
BEFORE THE HONORABLE DAVID A. FABER, SENIOR STATUS JUDGE
UNITED STATES DISTRICT COURT
IN CHARLESTON, WEST VIRGINIA

MAY 13, 2021

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1 PROCEEDINGS had before The Honorable David A. Faber,
2 Senior Status Judge, United States District Court, Southern
3 District of West Virginia, in Charleston, West Virginia, on
4 May 13, 2021, at 9:00 a.m., as follows:

5 THE COURT: Mr. Nicholas?

6 MR. NICHOLAS: Thank you, Your Honor. Last night,
7 the plaintiffs served us 50 new exhibits or identified 50
8 new exhibits for us to review. Unfortunately, that's on top
9 of the 43 that they sent us on the first night for Mr.
10 Zimmerman testifying, that -- started to testify. So, I let
11 the 43 go even though you mentioned 30 because I'm really
12 not interested in, you know, bickering about every little
13 thing, but now that we have 50 new exhibits that have been
14 identified, I have to ask that they not be used. I think
15 it's, you know, out of the spirit and the letter of the
16 rules and I don't think they should be permitted to be used.

17 THE COURT: How many are you going to use, Mr.
18 Farrell?

19 MR. FARRELL: 20.

20 THE COURT: Well, why didn't you give him 20?

21 MR. FARRELL: Judge, we're trying to elicit
22 testimony from an adverse party and we are doing our very
23 best to anticipate foundational objections, hearsay
24 objection. And adapt to the practice of having to disclose
25 what we're going to use to cross examine adverse parties the

1 night before. I don't believe -- and this is why our
2 initial disclosure was very broad, so that we didn't get
3 caught in a box of having to go in a different direction
4 during adverse cross.

5 THE COURT: If he -- if he sticks to the 20,
6 designates the 20, will that solve your problem? It will
7 obviously help, right?

8 MR. NICHOLAS: I'm going to say it wouldn't solve
9 our problem, but it's better than nothing. So, I'll --

10 THE COURT: Okay. Give him 20 and that's it.
11 We've got to have some rules here and you can't flood your
12 opponent with paper. They'll do the same to you and the
13 trial will be totally out of control.

14 So, give him 20 and we'll let it go at that. You said
15 20. So, give him the 20.

16 MR. FARRELL: I -- one second, Judge. Let me --
17 (Pause)

18 MR. FARRELL: Judge, I've been advised that
19 potentially some of these documents are in anticipation of
20 redirect, but I don't think that anything I'm going to go
21 into today is materially outside of what was disclosed the
22 night before last and I'll stand on those words. I don't
23 anticipate these to be any surprise or new documents.

24 THE COURT: Okay. So, you're not going to give
25 him any today and you're going to stick with the 43 you gave

1 him when I told you to give him 30; is that right?

2 MR. FARRELL: I'll need a few minutes to
3 cross-reference the list on what was disclosed last night.
4 Judge, I'm not trying to play games here. I'm not trying to
5 surprise anybody. We're trying to react to a very technical
6 case that has documents that this witness has been
7 cross-examined before on and today what you'll see is my
8 clear intention to stay within the guardrails of presenting
9 to him documents that he will recognize.

10 THE COURT: Okay. So, where are we? You're
11 standing on the 43 you've already given him?

12 MR. FARRELL: Well, without -- I can outline
13 exactly what it is we intend to go through right now and I
14 don't have in my mind whether those documents fall on the
15 first list, the second list, the third list, or the fourth
16 list. I believe that all of these documents fall within
17 some type of disclosure that we have made in the last
18 72 hours, but I --

19 THE COURT: Well, saying they're within the same
20 type of disclosure doesn't get around the problem, Mr.
21 Farrell, because we're dealing with specific documents, not
22 a morphous category of documents.

23 MR. FARRELL: Respectfully, Judge, the problem
24 that we're having is anticipating what documents we want to
25 use to cross examine the adverse party in a realtime basis.

1 THE COURT: Well, that's a problem you have and
2 you have to prepare your cross and you've got to let the
3 other side know what documents you're going to use. That's
4 a simple thing, and you've given them 43, and you told me
5 that you could do 20 more, and then you could get by with
6 the same original 43. Now, what are you going to do?

7 MR. FARRELL: I'll need a moment to
8 cross-reference the 43 list to make sure.

9 THE COURT: Okay. All right. Can you do that
10 right now?

11 MR. FARRELL: I -- I believe they're doing it as
12 we speak.

13 THE COURT: All right. Is Mr. Zimmerman in the
14 courtroom?

15 MR. FARRELL: Judge, we have two other
16 administrative things to talk about.

17 THE COURT: Okay, go ahead.

18 MR. FARRELL: The first is, is that we issued a
19 subpoena for a custodial testimony from the Drug Emporium.
20 During discovery, we issued a subpoena for their dispensing
21 records.

22 THE COURT: Well, I was told there had been a
23 stipulation entered taking care of that. Is that not true?

24 MR. FARRELL: There is not. So, we served a
25 subpoena for the records custodian to come and to testify

1 that these are the documents that we subpoenaed, that they
2 are held in the usual course of business, and that they were
3 produced in response.

4 I anticipate the testimony will take five minutes. It
5 will not be substantive. It is laying the foundation. And
6 we'd ask for five minutes after the lunch break to get the
7 witness up and down.

8 THE COURT: Any problem with that?

9 MR. NICHOLAS: Well, my only problem with that, I
10 don't have a problem with them putting the witness on for
11 five minutes to do this. I would have a problem with doing
12 it in the midst of my examination of Mr. Zimmerman. So, it
13 may not come to anything because maybe we'll be done with
14 Mr. Zimmerman after the lunch break. If not, I'd like to be
15 able to complete that, and then they can put this person on.

16 THE COURT: How about that, Mr. Farrell?

17 MR. FARRELL: That's fine, as long as we get the
18 opportunity to put them on.

19 THE COURT: Okay. I may have authorized the
20 filing of the stipulation and I was told this morning it had
21 been entered into. Is that -- has that been entered?

22 LAW CLERK: It may be a different issue, Your
23 Honor.

24 THE COURT: Oh, okay. Okay, go ahead.

25 MR. FARRELL: The final matter is that for the

1 purposes of the record, I wanted to identify specifically
2 the plaintiffs' exhibits that we are asking for conditional
3 -- for you to conditionally admit. Review of the transcript
4 yesterday has several different times and places where we
5 had made the proffer. You came back after lunch, I believe,
6 and made some rulings and I just wanted to proffer for the
7 record the exact P numbers of that.

8 THE COURT: Well, I didn't keep a list. I usually
9 do, but I didn't keep a list as we go along of the documents
10 that came within the Court's conditional rulings. So, if
11 you can provide a list and both sides can agree that those
12 are the ones that were actually offered, that would be
13 helpful to all of us, I think.

14 MR. FARRELL: I don't think we're going to agree
15 to that, Judge.

16 MR. MAHADY: Your Honor, I want to give you a
17 preview of what these documents are. If -- during the
18 course of Dr. McCann's direct that the plaintiffs did, they
19 showed him, you know, maybe four to five charts for
20 SafeScript. We cross-examined the witness and, on redirect,
21 Mr. Mougey handed us an 80-page packet of all of the charts
22 for SafeScript Pharmacy. I objected. I said it's outside
23 the scope of our cross examination. They could have used it
24 on direct if they wanted to. You sustained that objection.
25 What Mr. Farrell is now trying to get under the Court's

1 conditional admitted order is the entire 80-page packet.

2 THE COURT: Well, no. The Court's conditional
3 order was intended to embrace the specific charts and
4 summaries offered by Mr. Mougey when he questioned Dr.
5 McCann.

6 MR. MAHADY: Thank you, Your Honor.

7 THE COURT: That did not include the packets that
8 he held up yesterday. So, I think you're exactly right, Mr.
9 Mahady.

10 MR. MAHADY: Thank you.

11 MR. FARRELL: And so, for the record, Judge, and I
12 respect your ruling. I would like to put on the record that
13 Mr. Mougey made a motion to admit P-44711, P-44758, P --

14 THE COURT: Okay. Now, is this the list of the
15 things that I conditionally admitted or is this the packet?

16 MR. FARRELL: This is -- this is the packet that
17 he had -- Dr. McCann described the methodology --

18 THE COURT: Okay, and you're making a record of --

19 MR. FARRELL: Yes, sir.

20 THE COURT: -- of those that you offered that I
21 have not admitted; is that right?

22 MR. FARRELL: That is correct.

23 THE COURT: You are trying to make the record so
24 your objection will be in a form that the Court of Appeals
25 can understand what it's all about, right?

1 MR. FARRELL: Yes, Your Honor.

2 THE COURT: Okay. Go ahead, please.

3 MR. FARRELL: P-44711; P-44758, which we are
4 referencing as the SafeScript packet; P-44754, which is the
5 McCloud packet; P-44749, which is the Drug Emporium packet.

6 Mr. Mougey then offered to present the remaining
7 packets for the pharmacies that are referenced in the matrix
8 diagram for CT2.

9 Finally, the matrix itself summary chart is P-43225,
10 which contains the national average, the state average, the
11 Cabell County average, selected pharmacies within Case Track
12 2, City of Huntington and Cabell County, and selected
13 pharmacies throughout the State of West Virginia, for
14 purposes which we have already proffered for the record.

15 MR. MAHADY: Your Honor, just for the record, at
16 least as it relates to Drug Emporium and McCloud Family
17 Pharmacy, they didn't even attempt to show the witness the
18 packets. So, they were -- I don't know how they could have
19 possibly been proffered into evidence.

20 THE COURT: Well, they haven't been authenticated
21 and they're just full of hearsay.

22 MR. MAHADY: And we haven't even seen -- the Court
23 hasn't even seen them yet. So, just for the -- I know
24 you've already ruled on this, but just for the record, those
25 weren't even shown to the witness and I'll pass it to Mr.

1 Schmidt.

2 THE COURT: I haven't admitted them, but Mr.
3 Farrell has got a right to make the record clear.

4 Mr. Schmidt?

5 MR. SCHMIDT: Yes. Just to add to the record we
6 agree with what Mr. Mahady said. In addition, they made the
7 election to show limited pages during the direct. That
8 binds them in terms of the scope of the redirect. There
9 would be a major issue in the record even trying to track
10 what the new pages are versus what the old pages are.

11 And then, during the redirect, they did not even
12 attempt to question on the new pages other than holding up
13 the document. There may have been one or two that they
14 questioned on. I'm not even sure if that happened. So,
15 those are our additional objections.

16 THE COURT: Mr. Ruby, we've gone almost two weeks
17 and you haven't said anything yet.

18 MR. RUBY: I'm going to break my streak, Your
19 Honor.

20 THE COURT: Okay.

21 MR. RUBY: Just for the Court's awareness, we did
22 speak -- counsel spoke with Ms. Skinner after court
23 yesterday evening and she asked us to compile our lists of
24 the exhibits that each side believed would be covered by the
25 Court's conditional admission ruling. So, we expect to have

1 that information to her shortly to assist the Court.

2 THE COURT: All right.

3 MR. FARRELL: Judge, may I, for the record?

4 THE COURT: Yes.

5 MR. FARRELL: We take exception to the
6 characterization that we did not even attempt to proffer the
7 packets. We attempted on numerous occasions, we believe the
8 record will show, to admit the packets and the Court did not
9 allow it and sustained the objections.

10 So, I just want to make the record clear that it was
11 not our purposeful decision, as counsel recommended, that we
12 did not move to admit. We attempted to and the Court
13 sustained the objections preventing us from doing so.

14 THE COURT: Okay.

15 Mr. Mahady?

16 MR. MAHADY: Your Honor, since these packets fall
17 outside of the Court's conditional approval, we would ask
18 that these packets, to the extent they were not shown to the
19 witness, are not used with witnesses on cross examination.

20 THE COURT: Well, I think that's right. You
21 should -- I conditionally admitted the exhibits that we've
22 identified as summary charts and I think you're limited to
23 that. The packets, I didn't let them in for a number of
24 reasons, and I don't -- I think Mr. Mahady is right. I
25 don't think you should use those, Mr. Farrell.

1 MR. MAHADY: Thank you, Your Honor.

2 MR. FARRELL: Yes, Your Honor.

3 THE COURT: All right. Mr. Zimmerman.

4 MR. NICHOLAS: I had asked him to stay out of the
5 courtroom while we were doing this argument, so he's right
6 outside.

7 THE COURT: Well, that's perfectly proper, Mr.
8 Nicholas. Thank you.

9 THE COURT: Good morning, Mr. Zimmerman.

10 THE WITNESS: Good morning.

11 THE COURT: You can take the witness stand and
12 you're still under oath, sir.

13 THE WITNESS: Thank you.

14 MR. FARRELL: Good morning, Mr. Zimmerman.

15 THE WITNESS: Good morning.

16 MR. FARRELL: Judge, may I approach the board?

17 THE COURT: Yes.

18 BY MR. FARRELL:

19 **Q.** Yesterday, we spoke --

20 MR. FARRELL: I'd ask for just 30 seconds of
21 lenience to recap.

22 BY MR. FARRELL:

23 **Q.** Yesterday, we spoke of the 2021 OxyContin hearing that
24 we addressed very briefly yesterday; do you recall that?

25 **A.** Yes.

1 Q. And then we went to the 2005 distributor initiative
2 meeting between the DEA and AmerisourceBergen.

3 A. Yes.

4 Q. And then we discussed in 2006 the immediate suspension
5 order?

6 A. 2007?

7 Q. I'm sorry. 2007 immediate suspension order?

8 A. Yes.

9 Q. And then we discussed the settlement and agreement with
10 the DEA immediately thereafter?

11 A. Yes.

12 Q. And then we discussed the Reed Smith letter following
13 that Settlement Agreement/ and that brings us up to speed,
14 correct?

15 A. That's as I remembered, yes.

16 Q. The next thing that we're going to discuss is the
17 second letter from the DEA dated December 27th, 2007 from
18 Joe Rannazzisi.

19 MR. FARRELL: And I'll circulate copies.

20 Judge, may I approach?

21 THE COURT: Yes.

22 MR. FARRELL:

23 Q. For the record, it is P-3 and I'm going to place a
24 black flag the best I can toward the end of December of 2007
25 while you review the document. When you get finished

1 reviewing it, will you let me know, please, sir?

2 **A.** Okay. Okay.

3 **Q.** Do you recognize this document?

4 **A.** Yes. I've seen it before.

5 **Q.** What is it?

6 **A.** It's a letter to the registrants.

7 **Q.** What is the date of it?

8 **A.** The date?

9 **Q.** Yes, sir.

10 **A.** June 12th, 2012.

11 **Q.** I'm sorry.

12 **A.** Did you ask me the date? I'm sorry.

13 **Q.** I apologize. This is the compilation. This is P-3.

14 I'm going to ask you to go to the December 27th, 2007,
15 letter.

16 **A.** Oh, I'm sorry.

17 **Q.** It would be Bate stamped 3 at the bottom.

18 **A.** Okay.

19 **Q.** What is this document?

20 **A.** It looks like the other document. It's a letter from
21 the DEA to the registrants.

22 **Q.** What is the date of the document?

23 **A.** This one is December 27th, 2007.

24 **Q.** And would you look to the bottom right-hand corner and
25 read into the record the Bates stamped numbers starting

1 ABCDMDL?

2 **A.** 00378495.

3 **Q.** Who is this letter from?

4 **A.** Joe, Joseph Rannazzisi.

5 **Q.** And where does Joseph Rannazzisi work?

6 **A.** He was the Deputy Assistant Administrator of Diversion
7 Control for DEA.

8 **Q.** Do you recognize this document as being sent from the
9 DEA to AmerisourceBergen amongst other registrants?

10 **A.** Yeah. I believe it was sent to our distribution
11 center, the registrant location.

12 **Q.** And as the Chief of CSRA, did you review this letter
13 when it was sent to AmerisourceBergen?

14 **A.** I -- I don't specifically recall, but I'm sure I would
15 have looked at it, yes.

16 **Q.** You have reviewed it since receipt, correct?

17 **A.** Yes.

18 **Q.** And you're familiar with what it says?

19 **A.** Yes. I've seen it before, yes.

20 **Q.** You've been deposed and we've talked about this
21 document before, correct?

22 **A.** Correct. You said we talked about it? Maybe in my
23 deposition, is that what you're referring to?

24 **Q.** Yes.

25 **A.** Yes.

1 **Q.** On behalf of -- as a 30(b)(6) designee for
2 AmerisourceBergen, you've acknowledged AmerisourceBergen
3 received this correspondence?

4 **A.** There's -- there's three -- I think -- I think you
5 mentioned it yesterday. There's three letters from the DEA,
6 R-1, R-2 and R-3, and we could only substantiate we received
7 two. I can't remember which was the third one, but we could
8 not find record of receiving a third one. And I don't know
9 which of the three it was, but since that time period, I've
10 seen the letter, yes.

11 **Q.** But you acknowledge this is a communication from the
12 DEA to AmerisourceBergen that you received and reviewed and
13 you were on notice of the contents?

14 **A.** As I stated, one of the three letters I don't recall
15 seeing until years later and we could never find -- we could
16 never substantiate that we actually received the letter.
17 I'm not saying we didn't or we did. One of the three. Two,
18 we were able to.

19 MR. FARRELL: Judge, may I have one moment?

20 THE COURT: Yes.

21 (Pause)

22 BY MR. FARRELL:

23 **Q.** I'm going to see if we can identify it in the
24 transcript and refresh your recollection at a later point.

25 **A.** Okay.

1 MR. FARRELL: In the meantime, Judge, this is the
2 last of the Rannazzisi letters that we intend to present
3 collectively as P-32 and we would move for its admission,
4 along with the other documents from the DEA contained
5 therein.

6 MS. MAINIGI: Objection, Your Honor.

7 THE COURT: Yes, what basis?

8 MS. MAINIGI: One of -- both a combination of
9 foundation and hearsay, Your Honor. I think that, as Mr.
10 Farrell reflected, this is a compilation packet of several
11 letters. I don't believe either yesterday or today we've
12 even gone through all of the letters to lay a foundation
13 that Mr. Zimmerman would have seen them.

14 As Mr. Zimmerman just said, there's at least one that
15 he could not identify and I am assuming that whichever
16 letter gets admitted, if they get admitted, that they would
17 not be admissible for truth.

18 THE COURT: Well, they haven't been authenticated,
19 so I'll sustain the objection at this point.

20 MR. FARRELL: Judge, we have a stipulation with
21 the parties specifically authenticating these letters.

22 THE COURT: Is that right, Ms. Mainigi?

23 MS. MAINIGI: Your Honor, I think there is a
24 stipulation as to certain documents. I would ask to have
25 the opportunity to check all of these because I'm not sure

1 all of these are on the list, but we can certainly check,
2 but I don't think irrespective of whether there's a
3 stipulation or not, it's really --

4 THE COURT: Well, I'm not going to admit them
5 until you can persuade me they're within the stipulation.

6 Mr. Hester?

7 MR. HESTER: Yes, Your Honor. I was going to also
8 add the stipulation does not go to foundation. It's, at
9 most, a stipulation on authenticity and I did want to make
10 clear our objection on hearsay grounds to the admission of
11 these documents, as well.

12 THE COURT: All right. At this point, I'll
13 sustain the objection.

14 BY MR. FARRELL:

15 Q. So, we're going to walk through this correspondence and
16 I'm going to ask you a few questions.

17 A. Okay.

18 Q. The dear registrant letter, will you read the first
19 paragraph, please?

20 A. "This letter is being sent to every entity in the
21 United States registered with the Drug Enforcement
22 Administration to manufacture or distribute controlled
23 substances. The purpose of this letter is to reiterate the
24 responsibilities of controlled substance manufacturers and
25 distributors to inform DEA of suspicious orders in

1 accordance with 21 CFR 1301.74(b)."

2 **Q.** Thank you. Now going to the second paragraph, the
3 sentence that begins, "The regulation clearly indicates",
4 would you please read aloud?

5 **A.** "The regulation clearly indicates that it is the sole
6 responsibility of the registrant to design and operate such
7 a system."

8 **Q.** Continue.

9 **A.** "Accordingly, DEA does not approve or otherwise endorse
10 any specific system for reporting suspicious orders."

11 MR. HESTER: Your Honor, may I object? The
12 witness is being asked to read in a document into the record
13 and it's not clear to me what basis there is for it when
14 there's a hearsay objection.

15 THE COURT: Sustained.

16 MR. FARRELL: Judge, we're providing this not for
17 the truth of the matter asserted, but for notice of the
18 DEA's position communicated to --

19 THE COURT: You haven't authenticated it or shown
20 it's admissible and, until you do that, I'm going to sustain
21 the objection and not let it in. I don't think it's proper
22 for you to question him about a document that's out there
23 unauthenticated and not admitted.

24 MR. FARRELL: Okay.

25 THE COURT: Now, if he's a hostile witness, it

1 could give you, I guess, a good faith basis to ask him a
2 question or two, but not have him read -- read the letter.

3 MR. FARRELL: Yes, Your Honor.

4 THE COURT: And I haven't found him to be hostile
5 yet. Are you saying -- well, I'm raising an issue that --

6 MR. FARRELL: Judge, I don't believe that his
7 testimony has been hostile. He's been very cooperative. We
8 do believe that he is an adverse witness and he has -- in
9 his testimony, the second question I asked him was which
10 party he identified with and he named AmerisourceBergen.
11 Under Rule 611, that puts it squarely within the grounds for
12 me to ask leading questions and treat him as an adverse
13 party.

14 THE COURT: Do you agree with that, Mr. Nicholas?

15 MR. NICHOLAS: I'm sorry. I was -- my friend Mr.
16 Mahady was --

17 THE COURT: He says Rule 611 gives him the
18 authority to ask him leading questions even though he hasn't
19 been hostile.

20 MR. NICHOLAS: I -- honest -- yeah. I have not
21 been objecting to the leading because I think within --
22 within reason, he can lead him a little bit pursuant to the
23 rule. That was my understanding of the rule because he's --
24 because he's a party, but that's why I haven't been
25 objecting to the leading.

1 THE COURT: Yes. We need to get through this.

2 MR. NICHOLAS: Yeah.

3 THE COURT: So -- so, I'll let you lead him a
4 little bit, Mr. Farrell.

5 MR. FARRELL: Yes. I apologize, Your Honor. I'm
6 --

7 MR. NICHOLAS: Go ahead, I'm sorry. I apologize.

8 MR. FARRELL: I'm going to move off of this
9 particular document until I can get the transcript from his
10 prior deposition. I would like to sever and separate the
11 two P-32 documents now for the record. So, the September,
12 2006 Rannazzisi letter which was previously identified as
13 one of the components of P-32, I would like to have
14 designated in the record as P-32A, Alpha.

15 THE COURT: Which page is that?

16 MR. FARRELL: It would be Bates stamp Pages 9, 10,
17 11 and 12.

18 THE COURT: Okay. So, that -- that is going to be
19 removed from this packet and given a new number, right?

20 MR. FARRELL: Yes, Your Honor, P-32A, Alpha.

21 THE COURT: Okay.

22 MR. FARRELL: And then we'll have designated
23 separately the December 27, 2007 letter, which has Bates
24 stamp P-32_3 and _4. We'll call that P-32B, as in Bravo,
25 and I will make a proffer to the Court that in the

1 deposition of Thomas Prevoznik from the DEA's 30(b)(6)
2 designation that we tendered to the Court the foundation and
3 the circulation of this document was asked for and
4 established in that deposition.

5 THE COURT: Is there still an argument about
6 whether I should consider that deposition? I know at one
7 point there was a motion made to kick it out.

8 MR. FARRELL: It's still pending, Your Honor.

9 THE COURT: Still pending?

10 MR. MAHADY: It's still pending, Your Honor, and I
11 think there is an issue.

12 THE COURT: Okay. Where does that leave you, Mr.
13 Farrell?

14 MR. FARRELL: In a very difficult position.

15 THE COURT: Well --

16 MR. FARRELL: Can I -- can I ask about this
17 document on conditional relevancy and if, in fact --

18 THE COURT: Well, if he -- if he identified it in
19 his deposition, isn't that sufficient even if I kick out the
20 bulk of his testimony?

21 MR. MAHADY: You're referring to Tom Prevoznik?

22 THE COURT: Yes.

23 MR. MAHADY: So, one of the issues that we have
24 with Tom Prevoznik and that we raised in the motion is that
25 he lacked personal knowledge for a lot of the issues he

1 testified about. As Mr. Farrell has explained, these
2 letters come from Joe Rannazzisi, not Tom Prevoznik. I do
3 not believe he was within the Office of Diversion Control at
4 the time.

5 So, I do think these -- his testimony as to when the
6 dear registrant letters were sent would probably fall pretty
7 squarely within the confines of the motion that we've teed
8 up.

9 THE COURT: Well, so your point is if he -- the
10 only thing I'm concerned about now is whether he properly
11 identified and authenticated the document. If he did that
12 in his deposition, then I can let Mr. Farrell use them even
13 if I kick the deposition, can't I?

14 MR. MAHADY: I'm not sure if Tom Prevoznik would
15 have been in a position to properly authenticate the
16 documents given his lack of involvement, but I defer to -- I
17 defer to Your Honor.

18 THE COURT: Well --

19 MS. MAINIGI: Your Honor, if I may just add, Mr.
20 Prevoznik was not in Diversion Control until 2012, so we do
21 not think he can authenticate the letters prior to 2012.

22 THE COURT: Okay. You've got a problem you need
23 to get around here, Mr. Farrell.

24 MR. FARRELL: I'm working on it, Judge. I think I
25 have a temporary solution. I'm going to reference Mr.

1 Zimmerman's deposition on Friday, August 3rd, 2018, Page
2 145. My colleague, Mr. Pifko, is the one that deposed Mr.
3 Zimmerman.

4 COURT REPORTER: I'm sorry. Who was it again?
5 I'm sorry.

6 MR. FARRELL: Mr. Pifko, P-i-f-k-o. And on Page
7 145, Mr. Pifko says, "I'm handing you what has been marked
8 as Exhibit 6. For the record, these are a series of letters
9 from the Department of Justice." Gives the Bates stamp.

10 "For the record, there's four letters in this packet.
11 You'll see down at the bottom one of them is December 27th,
12 2007."

13 On the next page, the question was asked, "These are
14 what we refer to as dear registrant letters. Have you heard
15 that term before?" The witness answered "yes." The next
16 question is, "Did AmerisourceBergen receive a copy of this
17 letter?" Answer, "I believe one or more of our distribution
18 centers did."

19 Question, "When you were at the company at that time,
20 did you receive a copy of that letter?" Answer, "I
21 eventually saw a copy of the letter."

22 MR. NICHOLAS: Well, Your Honor, it says -- it's
23 referring to one letter. It doesn't say which one it is.
24 And it looks like -- it looks like this is a reference to
25 the September --

1 Let's go back. Could you go back to that page just so
2 I can see where I was doing this?

3 Someone just took down the testimony I was looking at.
4 I just want to wait until it comes back.

5 UNIDENTIFIED SPEAKER: It's up in front of you
6 now.

7 MR. NICHOLAS: Oh, I'm sorry. I'm sorry. Okay.

8 It says, "Let's start with the first one dated
9 September 27th, 2006." Okay, so it looks like he -- he does
10 -- that's one of the ones that he saw. It says, "I
11 eventually" -- what it says is, "I eventually saw a copy of
12 this -- of the letter. I never received one from the DEA --
13 from DEA."

14 Actually, that -- so, that calls into question all --
15 that letter, as well, because he says he never received it
16 from the DEA, but be that as it may, we're only talking
17 about one letter at most.

18 MS. MAINIGI: And, Your Honor, if I may add, also,
19 as I recall the testimony from yesterday, Mr. Zimmerman was
20 not able to identify the 2006 letter and the testimony that
21 was just read out loud incompletely is not inconsistent with
22 that because he, in his deposition testimony, does appear to
23 -- I think the page is gone.

24 He -- he hedges a bit, understandably, and says that it
25 was probably received at the distribution centers and he

1 says he's eventually seen the letters. So, the testimony is
2 unclear, but I do think yesterday his testimony was clear on
3 the 2006 letter, as I heard it that, he could not -- he did
4 not recall receiving the letter.

5 THE COURT: Okay. Mr. Farrell, I'm not going to
6 let you question him about the letters at this time. I'm
7 sure you'll figure out a way to get another bite at the
8 apple down the road, but for now, I'm not going to let you
9 do it on the ground that there hasn't been a proper
10 identification and authentication of the letters or the fact
11 that this witness has familiarity with it.

12 MR. FARRELL: I'm sorry, Your Honor. I missed
13 that last part.

14 THE COURT: There's no showing that this witness
15 has familiarity with the letters.

16 MR. FARRELL: I'm working on that, Judge.

17 THE COURT: Okay.

18 BY MR. FARRELL:

19 **Q.** Mr. Zimmerman, are you familiar with the OMP Program at
20 AmerisourceBergen?

21 **A.** Put a time context to it, but I've been familiar with
22 it since being with the company. So, depending on what time
23 frame. I do understand the OMP Program. I just want to
24 make sure I understand what time frame if we're going to be
25 talking about it.

1 Q. You've been at this company since 1990?

2 A. Correct.

3 Q. And you're still there today?

4 A. Yes.

5 Q. You're in charge of CSRA?

6 A. Yes.

7 Q. One of CSRA's obligations or responsibilities is to
8 develop a Suspicious Order Monitoring System?

9 A. Correct.

10 Q. You were -- you were the one involved that were (sic)
11 involved with and implemented the policies and procedures?

12 A. I oversee the process, correct. My department is
13 responsible. Ultimately, me, yes.

14 Q. So, in discovery, we were provided a list of the
15 documents from the CSRA under the OMP Program and I have a
16 list of ten of them that I would like to show you and to put
17 into the record. It's not comprehensive. The list is
18 enormous. But these appear to be from our review documents
19 we want to discuss.

20 And I'll go ahead and proffer for the record which ones
21 they are. They shouldn't be a surprise.

22 MR. MAHADY: Can we be given the documents while
23 you proffer them?

24 MR. FARRELL: Yes.

25 MR. MAHADY: Can we get them before you proffer

1 them?

2 MR. FARRELL: Yes, Your Honor.

3 MR. MAHADY: And, Your Honor, we would just like
4 to know if these were on the list of the 38 or so that were
5 disclosed two nights ago?

6 THE COURT: Were they, Mr. Farrell?

7 MR. FARRELL: Yes. These have been disclosed for
8 a long time. This is the compendium of exhibits of their
9 Suspicious Order Monitoring System.

10 THE COURT: Well, being disclosed for a long time
11 doesn't tell me that they were on the list that you supplied
12 Mr. Nicholas.

13 MR. FARRELL: Yes. This was disclosed last night.

14 THE COURT: Okay.

15 MR. NICHOLAS: Okay. Well, all right. Last night
16 is the 50 that is being culled down to the 20. So, this is
17 -- this is ten of the 20. This is ten of the 20 that are
18 left, I think.

19 THE COURT: Okay.

20 MR. NICHOLAS: Right?

21 THE COURT: All right. Go ahead, Mr. Farrell.

22 MR. FARRELL: May I approach the witness?

23 THE COURT: Yes, you may.

24 BY MR. FARRELL:

25 **Q.** This is P-82.

1 MR. NICHOLAS: I think we haven't received the
2 documents, so we'd like to see a copy of them before --
3 before they're shown to the witness.

4 THE COURT: Yes. Do you have a copy?

5 MR. FARRELL: Judge, we did not anticipate that we
6 were going to have to go through this amount of detail and
7 documents that were previously stipulated to. To save the
8 Court some effort, can I exercise five minutes of recess to
9 get my documents together?

10 THE COURT: Yes. Yeah. We'll be in recess for
11 five minutes.

12 (Recess taken)

13 MR. NICHOLAS: Your Honor, if I may, over the
14 break, we -- I was reminded that we had entered a prior
15 stipulation with the plaintiffs in which we said that we
16 would not object to the introduction of certain documents
17 through certain witnesses. The Rannazzisi correspondence
18 falls within those -- falls within the stipulation.

19 So, I hadn't raised the initial objection, but -- but I
20 will say that we do not object to the introduction of these
21 documents through Mr. Zimmerman. We said we wouldn't object
22 to that and we don't.

23 We maintain all evidentiary, you know, objections on
24 grounds of hearsay and I may get up and down and talk about
25 that, but just so the record is clear, you know, he can --

1 he can use -- he can introduce the documents and ask
2 questions on them.

3 THE COURT: Well, thank you, Mr. Nicholas.

4 Does that -- do the other defendants agree with that?

5 MS. MAINIGI: Yes, Your Honor. We found the
6 stipulation over the break. I think we do maintain all the
7 other evidentiary objections.

8 THE COURT: I understand that.

9 Mr. Hester?

10 MR. HESTER: Same position, Your Honor. We do
11 have a hearsay objection to the letters but, otherwise, we
12 understand the stipulation governs.

13 THE COURT: All right. Well --

14 MR. NICHOLAS: And just one more thing I want to
15 say on the record, if it's okay. Just so -- just so it's
16 clear that we're not trying to pick at Mr. Farrell for the
17 sake of it when I -- when I ask for the exhibits and the
18 documents the night before. This kind of thing can be
19 avoided if we have the time -- you know, if we don't get a
20 hundred documents the night before kind of thing. So, I do
21 apologize to the Court for the time that was taken on this.

22 THE COURT: Well, we did take an hour to do this.

23 MR. NICHOLAS: Yeah.

24 THE COURT: Okay. Mr. Zimmerman --

25 MR. FARRELL: Judge, before we proceed --

1 THE COURT: I'm sorry?

2 MR. FARRELL: Before we proceed, I would like to
3 add some color to the purpose and the practice that we are
4 attempting to follow.

5 THE COURT: Okay.

6 MR. FARRELL: This is complex litigation involving
7 a lot of witnesses over a long period of time. There's
8 documents that have been produced in discovery that have
9 hearsay issues. There are documents that have sponsoring
10 witness issues. There are documents that have internal
11 e-mails within departments.

12 We had protracted negotiations with the defendants so
13 that we didn't need to proffer for you a hundred 5-minute
14 videotaped testimony laying sponsoring witness
15 authentication testimony.

16 We entered into a stipulation, and it's in the docket,
17 and it is ECF 1306, and we identified each of the documents
18 that we intended to use at trial and we entered into a
19 stipulation that if they would bring four live witnesses, we
20 would agree that we would not take the deposition of their
21 CEO. We negotiated an actual agreement that we sat down on
22 discovery so that we would have sponsoring witnesses to put
23 on AmerisourceBergen, Cardinal Health and McKesson's own
24 testimony.

25 To our detriment, we took a position so that we could

1 put documents that they know are authentic, that they know
2 are within the -- being held within the normal course of
3 business, so that we didn't have to go through all of this.
4 And so, it's frustrating to stand up here now and then to
5 have to go back and build a record that we did not
6 anticipate we would need to build.

7 THE COURT: I understand.

8 MR. NICHOLAS: Well, I -- I guess the only thing
9 I'll say is -- to this is, yes, that's why I brought the
10 stipulation to your attention. I don't agree with
11 necessarily all the characterization of the back and forth.
12 I don't know what's to whose detriment. You know, it was a
13 negotiated thing. But, yeah, that's why I brought it up
14 and, you know, I hope we don't have to continue to go
15 through this kind of thing.

16 THE COURT: Okay.

17 All right. Mr. Zimmerman, can you resume the witness
18 stand, please?

19 MR. FARRELL: Thank you. Judge, at this time, we
20 would ask for P-32 to be admitted into the record.

21 THE COURT: Any objection?

22 MR. HESTER: Just preserving our hearsay objection
23 to the document, Your Honor.

24 MR. NICHOLAS: Same.

25 THE COURT: All right. Subject to that, you may

1 -- it's admitted.

2 **PLAINTIFF EXHIBIT P-32 ADMITTED**

3 MR. FARRELL: Thank you.

4 Bring out P-32, please. I think -- have I circulated a
5 copy?

6 MR. HESTER: Yes, you did.

7 MR. NICHOLAS: Of the three letters, yes.

8 BY MR. FARRELL:

9 **Q.** Mr. Zimmerman --

10 MR. FARRELL: Judge, may I approach the screen?

11 THE COURT: Yes.

12 BY MR. FARRELL:

13 **Q.** Go to Bates stamp Page 3 and 4. So, we're not going to
14 get into the first paragraph. We're going to go to the
15 second paragraph.

16 Mr. Zimmerman, you acknowledge and recognize that this
17 is a communication from the DEA to AmerisourceBergen
18 providing notice that the DEA does not approve or otherwise
19 endorse any specific system of reporting suspicious orders,
20 correct?

21 **A.** That's what it states.

22 **Q.** And it also states that the DEA -- that any prior
23 implicit or explicit suggestions that they have approved
24 systems in the past are hereby revoked. Do you see that,
25 sir?

1 **A.** I do.

2 **Q.** Now, the third paragraph, I'd like for you to read the
3 first sentence.

4 **A.** "The regulation also requires that the registrant
5 inform the local DEA Division Office of suspicious orders
6 when discovered by the registrant."

7 **Q.** Now, again, this is using the when-discovered language
8 that we've been discussing in the past, correct?

9 **A.** Yes.

10 MR. NICHOLAS: Objection. Objection.

11 THE WITNESS: It's stated in the document the
12 when-discovered, correct.

13 BY MR. FARRELL:

14 **Q.** The when-discovered language was referenced in
15 yesterday's testimony. Do you remember that?

16 **A.** I remember discussing it. I'm not sure what context,
17 but yes.

18 **Q.** So, the next sentence says, "Filing a monthly report of
19 completed transactions", and then in parentheses,
20 ("excessive purchase report" or "high unit purchases") does
21 not meet the regulatory requirement to report suspicious
22 orders.'" Do you see that sentence? Did I read it
23 correctly?

24 **A.** Yes.

25 **Q.** And do you acknowledge this is the DEA providing notice

1 that it believes in 2007 that simply reporting suspicious
2 orders after the fact, they do not deem it to be compliant
3 with regulatory law?

4 **A.** That's what it states.

5 **Q.** This is what the DEA provided notice to you in 2007,
6 correct?

7 **A.** This is the guidance letter that they provided in 2007.

8 **Q.** All right. I'd like to go and focus your attention at
9 the very bottom of the page, the very last sentence. "The
10 determination of whether", do you see that, sir?

11 **A.** I do.

12 **Q.** Will you read that into the record?

13 **A.** "The determination of whether an order is suspicious
14 (sic) not only on the ordering patterns of the particular
15 customer, but also on the patterns of the registrant's
16 customer base and the patterns throughout the relevant
17 segment of the regulated industry."

18 **Q.** Sir, do you acknowledge that this is the DEA in 2007
19 providing notice to AmerisourceBergen that it expects you,
20 when reviewing suspicious orders, to look for patterns from
21 the customers' prior purchase history?

22 MS. MAINIGI: Objection, Your Honor. This use of
23 notice, this is calling for a legal conclusion. The last
24 two questions have done that.

25 THE COURT: Overruled. You can go ahead, Mr.

1 Farrell.

2 THE WITNESS: What was the question, sir?

3 BY MR. FARRELL:

4 **Q.** Do you acknowledge that this 2007 correspondence is the
5 DEA providing notice to AmerisourceBergen that when you are
6 looking to determine whether an order is suspicious that you
7 should look at the ordering pattern of that particular
8 customer?

9 **A.** In a general sense. I mean, I think DEA referred to
10 these as guidance letters, so it's providing guidance of
11 things that you could look at.

12 **Q.** Let me rephrase the question. Does this 2007 letter
13 provide guidance to AmerisourceBergen that when it was
14 looking for suspicious orders, it should look for ordering
15 patterns from the particular customer?

16 **A.** It says to look at the customer base and the patterns
17 throughout.

18 **Q.** And does it also provide guidance that you should look
19 for patterns amongst the customer base of AmerisourceBergen?

20 **A.** They're recommending you could do that. I mean, the
21 regulations are very specific about pattern and frequency.
22 It doesn't have any of this in the regulations and, I mean,
23 there's a tool to get that.

24 If this is the -- if they want to create a requirement
25 for the distributors to follow, then just enhance the

1 regulation, put it in a proposed rule, and put it in the
2 act, and then we're clear. But these guidance letters cause
3 confusion because it was guidance.

4 And, you know, for instance, they say they don't
5 approve a program, but we entered an agreement to mail our
6 suspicious orders to Washington, DC and we -- this says
7 should I ignore our agreement with the DEA to send our
8 orders to DC? Because this letter says we have to send them
9 to the District Office. So, what's a registrant to do,
10 follow the legal agreement or the guidance letter?

11 **Q.** So, two parts to that, sir. The reason that
12 AmerisourceBergen was sending the Suspicious Order Reports
13 to headquarters was because you entered into a Settlement
14 Agreement with the DEA following an immediate suspension
15 order.

16 **A.** But this says no -- any prior agreements are null and
17 void, this -- this guidance letter. So, does that make that
18 agreement null and void? (Unintelligible).

19 COURT REPORTER: I'm sorry. What was that last
20 part? I got "make that agreement null and void". I didn't
21 hear the last sentence.

22 THE WITNESS: Yes. If I -- if we're supposed to
23 follow the guidance letter, this tells me to ignore my legal
24 agreement with the DEA we entered into in 2007, in June,
25 because it's saying any prior agreements are -- I don't know

1 what's the exact terminology.

2 **Q.** Mr. Zimmerman, did you ask that question of the DEA?

3 MR. NICHOLAS: Your Honor, I'm sorry. I think the
4 witness was still trying to answer the question.

5 THE WITNESS: Did you want me to look through here
6 and find it? Let me see if I can find it. It might have
7 been one of the other ones. In one of these letters, it
8 says that any past -- DEA will not recognize or approve any
9 program.

10 MR. FARRELL: Judge, may I continue?

11 THE COURT: Yes.

12 BY MR. FARRELL:

13 **Q.** Did you ask the DEA this very question to clear up any
14 ambiguity?

15 **A.** No, because this was a guidance letter, not a -- not a
16 legal document or a regulation.

17 **Q.** So, you agree that this is a guidance document from the
18 DEA recommending that AmerisourceBergen, when looking for
19 whether an order is suspicious, for a particular customer to
20 compare it to patterns from your other customers; agreed?

21 **A.** It would -- it is a suggestion that you could look at
22 patterns throughout the relevant segment of that, like
23 hospitals versus pharmacies.

24 **Q.** Yes, sir. That's the third component to this. I'm
25 asking in particular whether or not the DEA in this 2007

1 letter provided guidance to AmerisourceBergen that when
2 you're looking to see whether an order is suspicious from a
3 particular customer you should compare it to patterns from
4 your other customers? Is that the guidance provided by the
5 DEA?

6 **A.** That's the guidance referenced in the letter, yes.

7 **Q.** And in addition to that, they recommend or provide
8 guidance that you should also compare the ordering patterns
9 of a particular customer throughout the relevant segment of
10 the regulated industry. Do you see that?

11 **A.** That's what it says, yes.

12 **Q.** Now, if you go to Page 2, the very last sentence. I'm
13 sorry. Now, the first paragraph of Page 2, the very last
14 sentence, will you please read it aloud?

15 **A.** Starting with "Also"? Oh, "Nevertheless, ordering one
16 highly abused controlled substance and little or nothing
17 else deviates from the normal pattern of what pharmacies
18 generally do (sic)."

19 **Q.** And you would agree with me in 2007 this is the
20 guidance provided by the DEA to AmerisourceBergen?

21 **A.** This is what's written in the letter, yes.

22 **Q.** Now, go to the third paragraph that starts with
23 "Lastly". Would you please read the first sentence, please?

24 **A.** "Lastly, registrants that routinely report suspicious
25 orders, yet fill these orders without first determining that

1 order is not being diverted into other than legitimate
2 medical, scientific, and industrial channels, may be failing
3 to maintain effective controls against diversion."

4 **Q.** And, again, this is guidance from the DEA in 2007
5 telling AmerisourceBergen that reporting orders and still
6 shipping them may fail to maintain effective control
7 according to the DEA?

8 **A.** That's what it states.

9 **Q.** Now, we're going to take an interlude within the black
10 flag analysis to talk about AmerisourceBergen's Suspicious
11 Order Monitoring System or, as you call it the, OMP, and
12 would you remind me, please, what OMP stands for?

13 **A.** Order Monitoring Program. It consists of several
14 different components.

15 **Q.** Sir, is it fair to say that, prior to 2007, that
16 AmerisourceBergen was reporting suspicious orders, but still
17 shipping them?

18 **A.** In most instances, that was the process that we had
19 worked with and designed with the DEA up until 2007.

20 **Q.** And that AmerisourceBergen was not sending individual
21 suspicious orders, but was running end-of-the-month summary
22 reports of all of the orders that were flagged by your
23 system?

24 **A.** That's not correct.

25 **Q.** I'm sorry. Would you please explain the process

1 pre-2007 of how AmerisourceBergen was identifying suspicious
2 orders?

3 **A.** So, pre-2007, there's three component. First component
4 is training of the staff at the distribution centers, that
5 if they see anything suspicious, they have an obligation to
6 report it as suspicious, which they would contact the DEA
7 and they complete a DEA contact form.

8 The second component was a daily transaction report
9 that would be sent to the local DEA Office on a daily basis,
10 which I -- which was -- when identified or when discovered,
11 which is in the document, they would receive that the next
12 morning when the orders were processed at night.

13 And then the third component up to -- was the DEA local
14 office wanted a monthly report. We would submit a monthly
15 report of all orders that had been reported.

16 The flexibility of the program is up to the individual
17 DEA office. They can receive a report weekly, monthly,
18 quarterly. They could have it designed for one product.
19 They could have it designed for one customer. It was
20 completely flexible for however the DEA wanted to best
21 utilize that information to prevent diversion.

22 **Q.** So, let's take each of those three components and break
23 them down for a second. The first one, I believe, you've
24 referenced as manual, the people that were in the cage would
25 identify orders that were suspicious?

1 **A.** If they identified an order that was suspicious,
2 correct.

3 **Q.** Can you explain to me how you trained the people in the
4 cage to identify suspicious orders?

5 **A.** So, they pick orders every day and if they're picking
6 one all the time and somebody says we want five cases, they
7 have an obligation to say that's not normal for what we do
8 and then would report that and we would investigate and find
9 out circumstances. And they're trained annually on that
10 process.

11 You know, that's what initiated our program with the
12 DEA in '96 and '98. We were making 12,000 phone calls a
13 year and the DEA offices was getting frustrated with the
14 amount of phone contact and pretty much telling us to stop
15 reporting, which we have a regulatory obligation.

16 That's what initiated me working with the DEA is, one,
17 the local offices who we are mandated to report to were
18 extremely upset with the daily phone calls of us reporting
19 suspicious order and were telling us to stop. So, that was
20 the interaction I had with DEA in working on the two-year
21 process that would work best for the field investigators to
22 act upon suspicious orders, but give them information that
23 wasn't bogging them down throughout the day with phone
24 calls.

25 **Q.** Were you, as the Head of CSRA, alarmed that your

1 pickers in the cage vaults were calling the DEA thousands of
2 times to report suspicious orders?

3 **A.** What it did was part of the 12,000 phone calls was the
4 -- was the regulation was so vague, which still remains
5 today. So, the problem we had in 1990 with a vague
6 requirement that said unusual frequency, quantity and
7 pattern without -- pretty much that's it in the regulation
8 and they've not changed it since caused vagueness.

9 So, it was up to the order filler to determine -- it's
10 just like it is today. It's up to us to determine. And I
11 think the letters, it says we won't tell you what's
12 suspicious and what's not, is what DEA says in these
13 letters.

14 So, if they're -- we will not give you any guidance on
15 what to report and what not to report. You have to figure
16 it out based upon what you know. And so, we have that same
17 discussion with our order fillers. So, they put that
18 position -- put that responsibility on them for knowing the
19 orders that they fill and, if they have any suspicion,
20 again, depending upon what they feel, they have an
21 obligation to report it, which resulted in 12,000 phone
22 calls because they were probably being overly conservative.

23 So, that was the purpose of starting to working with
24 DEA in '96, try to come up with some kind of standard
25 understanding that we could somehow -- because, again, what

1 was the DEA going to do with these 12,000 phone calls? They
2 didn't want any. They told us to stop.

3 So, we tried to work with them. It took two years of
4 working back and forth of what the report would look like,
5 what would be the trigger points, what should we do. There
6 was no discussion about stop shipping. There was never a
7 discussion in those two-year processes.

8 I worked with all the DEA offices. I worked with all
9 the program managers. And I worked with Washington, DC.
10 Never a reference to shop shipping.

11 And so, our program wasn't designed to stop shipping
12 because I think, again, as I stated yesterday, the purpose,
13 the main purpose of controlled substance is for patient
14 care, not for abuse.

15 And so, we have these requirements to make sure that
16 patients get these drugs in a responsible, safe manner and
17 anytime we stop an order or effect that supply chain based
18 upon a suspicion, a patient might not get their product and
19 that's me overruling a doctor that knows the patient and
20 overruling a pharmacy who sees the patient and knows the
21 patient background. I have none of that.

22 So, whenever we stop an order, we're effectively
23 overruling a doctor and a pharmacist and cause -- puts me in
24 a tough position to make that decision. So, you know, we
25 try to do the best we can with the vague regulations and our

1 moral responsibility to make sure these medications get to
2 pharmacies so they can be dispensed to patients.

3 **Q.** That's a lot to unpack there, Mr. Zimmerman. Let me
4 see if I can circle back. Let's go back to the first
5 aspect. You said that the people that were in the vault,
6 we're talking about the pickers and checkers; is that what
7 they're called?

8 **A.** Order pickers. Order fillers. We'd rather call them
9 order fillers.

10 **Q.** So, these are literally the men and women employed in
11 your warehouses who receive an order and go to a shelf?

12 **A.** Uh-huh.

13 **Q.** Pick up a box of controlled substances and then place
14 it for delivery?

15 **A.** These are people that work in the vault. They get the
16 customer order and if there's a discrepancy on the order,
17 they call the pharmacy and they say you meant -- did you --
18 what manufacturer brand Oxycontin? So they have ultimate
19 relationships with these pharmacies they do business with.

20 So, those are the people that know every -- they know
21 the customers that are ordering those controlled substances
22 because they have to clarify. I'm going back to the 90s.
23 They have to clarify when an order comes in on a narcotic
24 order form that they put oxycodone and there's three
25 different types. What manufacturer did they want?

1 So, sometimes there's a phone call to the doctor or
2 there's a ten. Did you mean that you wanted one? They
3 clarify that kind of discussion. So, there's interaction
4 with that order filler in the vault at that time because of
5 the way the business was structured.

6 **Q.** Excuse me.

7 **A.** Sorry.

8 **Q.** These individuals that are making determinations as to
9 whether an order is suspicious, did AmerisourceBergen have a
10 written policy defining in an objective manner what would be
11 suspicious for the pickers?

12 **A.** We cited the regulatory -- the Code of Federal
13 Regulations.

14 **Q.** Other than that, did you provide any guidance to the
15 pickers on how or when they should identify a suspicious
16 order?

17 **A.** When they identify something that they feel is of
18 unusual frequency, pattern or -- and size and we -- the
19 policy on what to do once you get that.

20 **Q.** Did you provide them the resources to be able to
21 compare one order to a previous order?

22 **A.** It's the same person that picked the previous -- I
23 guess I'm not understanding. I mean, these people work in
24 there every day. They fill every order.

25 **Q.** My question is, did you provide them resources so that

1 they could compare a present order to a past order?

2 **A.** I mean, they have inventory records and reports. I'm
3 not sure I understand your question.

4 **Q.** My question very simply is, is did you provide them a
5 computer? Did you provide them some way to scan? Or some
6 way to look at trends or patterns? Or are you expecting
7 them to remember?

8 **A.** No. I'm sorry. They have a computer system where they
9 look in and they see the past history and, usually, that
10 would be the first step and they can see what they've
11 ordered in the past to see if that's the product they
12 wanted. If there's any discrepancy with that, then they
13 would usually make the phone call. So, I wasn't hitting
14 every single point but, yes, they would key in the customer
15 number and see what they purchased in the past.

16 **Q.** So, the daily report, that was the second component of
17 your pre-2007 OMP?

18 **A.** Yes, correct.

19 **Q.** The daily report, would this be what you're submitting,
20 all the transactions and ARCOS to the DEA?

21 **A.** No.

22 **Q.** This is something different?

23 **A.** Yeah. No. So -- so, every time a customer orders an
24 opioid, it gets reported to the DEA three times.

25 **Q.** I understand. My question is, this is part of your

1 SOMS or OMP Program --

2 **A.** That's the --

3 **Q.** Not your reporting requirement to ARCOS, correct?

4 **A.** Completely separate.

5 **Q.** Very good. So, what is it that you were providing on a
6 daily basis to the DEA in -- or pre-2007?

7 **A.** Any order -- we -- what we were providing is what we
8 worked on for two years with the DEA on what -- I mean, I --

9 **Q.** I'm sorry, sir.

10 **A.** I'm explaining it to you.

11 **Q.** What I'm asking you is --

12 MR. NICHOLAS: Your Honor --

13 BY MR. FARRELL:

14 **Q.** Pre-2007, not -- not the policy that you enacted
15 afterwards?

16 MR. NICHOLAS: If the witness -- I'm sorry to
17 object. I would appreciate it if the witness could be
18 permitted to complete his answer and not be interrupted in
19 the middle of it.

20 THE COURT: Yes. He has the right to complete his
21 answer, Mr. Farrell. Go ahead. Sustained.

22 THE WITNESS: And maybe this will clarify, Mr.
23 Farrell. We worked with the DEA in '97 that I think you're
24 referring to; but then, I worked with them in '96, the same
25 process of working with them to design a program that was

1 acceptable for DEA.

2 So, in '96, we did work with them for two years. What
3 did you want to see? One of the big changes was, instead of
4 -- this is what DEA wanted, not -- was that let's compare
5 the customer to itself where, previous to that in the 90 --
6 early 90s, we would compare all pharmacies together in one
7 category.

8 So, if you had a small pharmacy, they're in the
9 same bucket as a huge pharmacy. And then, they take an
10 average and anything over the average would be suspicious.
11 And so, the large customers would get reported frequently.
12 Smaller customers would never get reported. And that was
13 also some of the confusion.

14 And I -- went to DEA and said, look at, you have these
15 huge reports that you're getting on a monthly basis and
16 you're getting 12,000 phone calls. Let's see if we can
17 somehow develop a program that meets the monthly -- what
18 your expectations are for monthly and what we can do for
19 immediate to see if we can get those phone calls down.
20 And that was the two-year process.

21 So, we came up with the trigger point was we would
22 compare a customer to themselves for a four-month pattern
23 and anything over an average of that individual customer
24 with a multiplier would be coded as suspicious and that's
25 what was reported the next morning to the DEA.

1 Q. So, you would take that particular customer's three --

2 A. I think it's four-month average, but yes. I think it's
3 four months.

4 Q. You would take the four-month average of that
5 particular customer, correct?

6 A. Correct.

7 Q. And then you would multiply the average by a
8 multiplier?

9 A. Correct.

10 Q. What multiplier were you using?

11 A. The one we've -- after two years of using different
12 multipliers, we settled at three, but that was completely
13 flexible. Each office could have it zero. They could have
14 it six.

15 We had some that wanted higher, six. Some wanted zero.
16 It was completely up to the DEA office what multiplier they
17 wanted.

18 Q. So, if the four-month average was ten, how many pills
19 could a pharmacy order before your system would flag it the
20 next month?

21 A. It depends on what the DEA office wanted. If they
22 wanted the three multiplier, it would be 30. If they wanted
23 the zero multiplier, it would be ten.

24 Q. Do you have anything in writing where the DEA has ever
25 said to AmerisourceBergen that it approves using a

1 multiplier for purposes of monitoring suspicious orders of
2 controlled substances?

3 **A.** We have a letter approving the program that we
4 developed with the three multiplier. I also have a letter
5 -- I think I've seen a letter from the DEA office asking us
6 to raise the multiplier to six.

7 **Q.** Do you have these letters?

8 **A.** Yes.

9 **Q.** Where? Did you bring them?

10 **A.** I don't have them with me.

11 **Q.** Okay. Because this letter, I believe, was the Burling
12 -- I'm sorry.

13 **A.** Bergen Brunswig.

14 **Q.** Bergen Brunswig that was discussed in Thomas
15 Prevoznik's deposition, correct?

16 **A.** I'm sorry. I didn't read his deposition.

17 **Q.** I apologize. I thought you said you read portions of
18 it.

19 **A.** No. I've not read any depositions in this trial.

20 **Q.** All right. And so, you say there's another letter
21 somewhere where the DEA actually asked you to raise it to
22 six?

23 **A.** From the DEA office. Again, remember, as I explained,
24 each DEA office have the opportunity to have it zero or ten,
25 whatever they wanted. Again, the requirement is written in

1 these guidance letters is we report directly to the regional
2 DEA office.

3 Again, this is '96 to '98, pre-2007, pre-these letters,
4 but still, the CFR requires you to report suspicious orders
5 to the local DEA office. So, we would consult with the
6 local DEA office of how they wanted those orders.

7 MR. FARRELL: Judge, may I have one second to
8 confer?

9 THE COURT: Yes.

10 (Pause)

11 MR. FARRELL: Judge, without belaboring the point,
12 I would ask that during the break that counsel provide to
13 the plaintiffs the letter referencing the six times.

14 THE COURT: Well, if you have it.

15 MR. NICHOLAS: Well, it's been produced in
16 discovery, Your Honor.

17 MR. FARRELL: Then we'll look for it.

18 THE COURT: Okay.

19 BY MR. FARRELL:

20 **Q.** So, if, in fact, the average is three times and the
21 average is ten, what would the next month -- what would be
22 the maximum amount of pills that could be ordered the next
23 month?

24 **A.** They could get more. This is a -- this is a -- this
25 was a --

1 **Q.** My question is, if the four-month average was ten and
2 the multiplier was three, what would be the maximum amount
3 of pills the customer could order the following month?

4 **A.** They could order as much as they want.

5 **Q.** Okay.

6 **A.** It could be flagged. What would be flagged as
7 suspicious would be anything over 30.

8 **Q.** So -- so, there would be 30?

9 **A.** Yeah. The program didn't stop, again, because of the
10 patient care, right? If we put a hard stop on it based upon
11 just some multiplier without any knowledge of what the
12 doctors are doing or what's going on in that area and the
13 responsibility of the pharmacists, then we would be stopping
14 the supply chain of medications and our role sits in the
15 middle, I think, that we talked about yesterday. We're in
16 the middle of the system.

17 Our system is to make sure we have products available,
18 maintained safely and securely, and ethical, efficacy,
19 ensure that when the pharmacy orders it for a patient, it's
20 available to them.

21 **Q.** So, to be clear, prior to 2007, a customer or pharmacy
22 could order as many pills as they wanted; that you would
23 ship it and then you would report anything in excess of
24 three times to the DEA?

25 **A.** They can order, but that doesn't necessarily mean we

1 would ship it. Again, it depends upon -- you asked what
2 would be categorized as suspicious and identified. That
3 doesn't mean people just can't order -- they can place an
4 order. It doesn't mean it's going to be filled.

5 So, if they ordered something, you know, large, one,
6 the order filler would probably say this is crazy. Our
7 systems have quantities for -- because people put in order
8 entry errors. So, if they meant to order ten and they
9 ordered a hundred, the system would capture that for all
10 products, not just for controlled substances.

11 **Q.** I'm going to have P-82.

12 MR. FARRELL: Judge, may I approach the witness?

13 THE COURT: Yes.

14 MR. FARRELL: For the record and for counsel, the
15 documents that were identified as the Suspicious Order
16 Monitoring Programs produced in discovery are referenced in
17 Appendix A of the stipulation and is also Appendix A to
18 AmerisourceBergen's fourth supplemental discovery responses.

19 For the purposes of today, I'm no going to go through
20 all of them, but I have ten of them that I would like to
21 proffer for the Court.

22 BY MR. FARRELL:

23 **Q.** Mr. Zimmerman, do you recognize this document?

24 **A.** It looks like a policy document.

25 **Q.** From where?

1 **A.** From Regulatory Compliance and Security Services.

2 **Q.** For which company?

3 **A.** For -- it would -- I think Bergen Brunswig, but I don't
4 know if it says it on here.

5 **Q.** This would be 1999?

6 **A.** Yes.

7 **Q.** And is this the -- one of the policies within the OMP
8 Program at what is now AmerisourceBergen prior to 2007?

9 **A.** That's what it appears to be.

10 MR. FARRELL: Judge, at this time, I would ask for
11 the admission of P-82.

12 THE COURT: Any objection?

13 MR. NICHOLAS: No objection.

14 MS. MAINIGI: No objection, Your Honor.

15 THE COURT: Hearing no objection --

16 MR. HESTER: No objection, Your Honor.

17 THE COURT: It's admitted.

18 **PLAINTIFF EXHIBIT P-82 ADMITTED**

19 BY MR. FARRELL:

20 **Q.** On P-82, if you look to Page 2, you'll see the very
21 last sentence of the first paragraph. Page 2, please. Is
22 that for suspicious order monitors, you do identify the
23 three-times multiplier, correct?

24 **A.** Well --

25 **Q.** Page 2? Top of the page, bottom line, first paragraph.

1 "The monthly average times factor for ARCOS items is
2 presently set by DEA at three times the monthly average."

3 Do you see that?

4 **A.** I do.

5 **Q.** Now, do you have any documentation that the DEA
6 approved this with the three-times multiplier?

7 **A.** So, one more point of clarification.

8 **Q.** Yes, sir.

9 **A.** So, when we designed a new program in '98, we continued
10 with the process, which is this ARCOS Excessive Order Report
11 that a lot of the industry was use -- utilizing and we had
12 to continue to send that report to the DEA monthly in
13 addition to the other newly designed. This is in addition
14 to. So, this was another reporting requirement.

15 I got some letters from DEA saying we could stop
16 sending this monthly report but, again, it was up to each
17 district DEA office.

18 So, this report was in place before -- it was like
19 1980. And so, the descriptions under the reports was a
20 report that was in place in the 80s and continued on until
21 the DEA told us we didn't need to send it anymore. It's in
22 addition to the one we described just a moment ago.

23 **Q.** Next is going to be a reference, I believe, a 2001
24 policy and procedure. It's P-953.

25 MR. FARRELL: Judge, may I approach?

1 THE WITNESS: Thank you.

2 BY MR. FARRELL:

3 Q. Sir, do you recognize this document?

4 A. Yeah. Let me just -- I'm almost done. Yes.

5 Q. And what is it?

6 A. It is a Suspicious Order Reporting Policy and
7 Procedures.

8 Q. For which company?

9 A. It appears to be AmerisourceBergen.

10 Q. Do you recognize this as the Suspicious Order Reporting
11 Policy or a policy at AmerisourceBergen dated January 12,
12 2001?

13 A. It appears to be.

14 MR. FARRELL: Judge, at this time, I would ask for
15 the admission of 953.

16 THE COURT: Any objection?

17 MR. NICHOLAS: No objection.

18 MR. HESTER: No objection, Your Honor.

19 MS. MAINIGI: No objection, Your Honor.

20 THE COURT: It's admitted.

21 **PLAINTIFF EXHIBIT 953 ADMITTED**

22 BY MR. FARRELL:

23 Q. The next document is P-26290.

24 MR. FARRELL: Judge, may I approach?

25 THE COURT: Yes.

1 BY MR. FARRELL:

2 Q. Sir, do you recognize this document?

3 A. It appears to be the Security Regulatory Policy and
4 Procedures Manual for AmerisourceBergen for our distribution
5 centers.

6 Q. And I'd like you to turn to Page 31. I'm sorry. It's
7 going to be actually Page 31 of the actual policy Bates
8 stamped at the bottom. There we go.

9 And if you'll highlight (b) all the way through.
10 That's good right there.

11 I'll direct your attention to what's on the screen as
12 Paragraph B, excessive suspicious orders of controlled
13 substances. Do you see that?

14 A. Yes.

15 Q. Sir, is this the -- is this the CSRA Policy and
16 Procedure Manual for Distribution Centers at
17 AmerisourceBergen Effective 2004?

18 A. Yes.

19 Q. And in it, it references that there are directives that
20 the compliance coordinator is responsible for assuring all
21 associates are thoroughly familiar with procedures for
22 recognizing and reporting suspicious orders; agreed?

23 A. Yes.

24 MR. FARRELL: And we're going to go through a
25 couple of those policies and procedures, but for now, I'd

1 like to ask for P-26290 to be entered into the record.

2 MR. NICHOLAS: Your Honor, if he's offering this
3 into evidence, we have no objection.

4 THE COURT: Are you offering it, Mr. Farrell?

5 MR. FARRELL: I'm sorry?

6 THE COURT: Are you offering it?

7 MR. FARRELL: I'm sorry, yes. We're moving it
8 into the record, please.

9 THE COURT: All right. And I hear no objection;
10 is that right?

11 MR. HESTER: No objection.

12 MS. MAINIGI: No objection.

13 THE COURT: All right. It's admitted.

14 **PLAINTIFF EXHIBIT P-26290 ADMITTED**

15 MR. FARRELL: Judge, this might be a good --

16 THE COURT: Well, we need to switch court
17 reporters here. So, that's a good suggestion. Let's be in
18 recess until 10:45.

19 (Recess taken)

20 (Proceedings resumed at 10:47 a.m.)

21 THE COURT: Mr. Zimmerman, you can resume the
22 witness stand, sir.

23 BY MR. FARRELL:

24 Q. Mr. Zimmerman, when we -- before we took off and
25 took a break, we were referencing the 2004 manual that

1 referenced policies and procedures that
2 AmerisourceBergen expected to be followed at the
3 distribution centers. I'm going to show you a couple of
4 those policies and procedures and hopefully I have them
5 correct.

6 First is going to be P-26293 which is Policy Number
7 CSRA 2.12, December 1st, 2005. I'm sorry. I think I -- did
8 I misspeak? 26293.

9 MR. FARRELL: Judge, may I approach?

10 THE WITNESS: Thank you.

11 BY MR. FARRELL:

12 Q. Mr. Zimmerman, do you recognize this document?

13 A. It appears to be a CSRA policy from December, 2005.

14 Q. And is this a policy that was adopted and enforced at
15 CSRA under your command?

16 A. It appears to be.

17 Q. What is the date of the document?

18 A. December 1st, 2005.

19 Q. What is the name of the document?

20 A. "Possible Excessive/Suspicious Order Review."

21 Q. What is the policy number?

22 A. CSRA 2.12.

23 MR. FARRELL: At this time I'd ask for the
24 admission of P-26293.

25 THE COURT: Any objection?

1 MR. NICHOLAS: No objection.

2 MS. MAINIGI: No objection, Your Honor.

3 MR. HESTER: No objection, Your Honor.

4 BY MR. FARRELL:

5 Q. If you would, for the record, please, read in the
6 Purpose.

7 A. "To ensure compliance with applicable state and federal
8 regulations, AmerisourceBergen Corporation has designed this
9 program to review the ordering activity of its customers to
10 identify the existence of possible excessive or suspicious
11 orders of controlled substances and listed chemicals."

12 Q. Now, for purposes of references on our board, this
13 policy was in effect after the DEA distributor initiative
14 meeting; correct?

15 MR. NICHOLAS: Your Honor, may I interpose an
16 objection?

17 The objection relates to the board, the use of the
18 flags on the board because the board, as I understand it,
19 represents all -- distribution from all distributors. So
20 we're, we're mixing metaphors or, or -- I don't know how to
21 put it, but the questioning is not matching up with what the
22 display is showing, particularly to the extent that he's
23 putting flags up there that supposedly show notice. But
24 this is -- what's being depicted isn't particular to
25 AmerisourceBergen. It's, it's all distribution over this

1 period of time from, from everyone. So I'll object to the
2 use of the board at this stage.

3 THE COURT: Well, what about that, Mr. Farrell?

4 MR. FARRELL: Judge, first, it's a demonstrative.

5 Second of all, as you recall, the defendants made great
6 hay with pointing out that this chart is publicly available
7 to the City of Huntington and Cabell County. And if it was
8 available to the City of Huntington and Cabell County, it
9 certainly was available to those that were selling pills to
10 see the volume of pills coming into the geographic region.

11 MR. NICHOLAS: But, but this chart is, is showing
12 the volume of pills nationwide for -- I'm sorry -- the
13 volume of pills to, to this region from everyone. So I'm
14 just not sure -- I'm not sure that the, the flags make sense
15 in relation to the chart. If it was just AmerisourceBergen
16 information, I guess I could understand it, but it's not.

17 THE COURT: He's saying you're using all three, if
18 I understand him correctly, information relative to all
19 three defendants to elicit the testimony of
20 AmerisourceBergen.

21 MR. NICHOLAS: And I believe it's more than all
22 three. I think it's all distributors.

23 MR. FARRELL: So my point ultimately, Judge, is
24 that I can pull up whatever chart we want. This is the
25 chart that everybody agrees shows the total volume of pills

1 that were being sold into the region that AmerisourceBergen
2 would have had notice of when they continued to sell pills
3 into Huntington/Cabell County. I'm not even making it
4 from -- I'm sorry.

5 THE COURT: I'm going to overrule the objection
6 and allow it. I, I -- if we had a jury, I think there would
7 be a danger of confusing the jury. And there's always a
8 danger that I'll get confused, but I don't think I am at
9 this point and I think I can draw the distinction.

10 So go ahead, Mr. Farrell.

11 MR. FARRELL: Thank you, Your Honor.

12 BY MR. FARRELL:

13 **Q.** So what we're talking about is from after -- this
14 is the policy, 26293, that is in force by
15 AmerisourceBergen after the first -- this meeting with
16 the DEA in 2005 and before the Immediate Suspension
17 Order that was served on AmerisourceBergen. Correct?

18 **A.** Yeah. This is the policy we initiated after our
19 meeting with DEA in 2005. This policy is in addition to our
20 other suspicious -- this is in addition, not that --

21 COURT REPORTER: I'm sorry?

22 THE WITNESS: It's not the suspicious order
23 reporting policy. This is an additional policy to review
24 customers that we put in place after our DEA meeting.

25 BY MR. FARRELL:

1 Q. I apologize if I hadn't made it clear. The 2004
2 manual, this thicker document I handed you, that's the
3 CSRA manual; correct?

4 A. It's the manual, correct.

5 Q. And it references additional policies that may be in
6 force; correct?

7 A. I, I'm not understanding the question.

8 Q. So we -- I had you read from the manual --

9 A. Yes.

10 Q. -- that the Chief Compliance Officer is responsible for
11 the training and enforcement of policies and procedures
12 promulgated by AmerisourceBergen. Do you recall that
13 testimony?

14 A. I remember something -- yes.

15 MR. FARRELL: Judge, I --

16 THE WITNESS: You said that -- you, you mentioned
17 a policy review. You mentioned it said other policies. And
18 I just want to make sure I understand exactly what we're
19 talking about.

20 I said -- I just -- my comment was just this -- I just
21 want to make sure you understood this wasn't our only
22 suspicious order monitoring policy in 2005.

23 BY MR. FARRELL:

24 Q. Yes, sir. Thank you. What I'm holding is 26293.
25 This is one of the policies AmerisourceBergen had in

1 place in 2005 related to suspicious orders?

2 **A.** Yes, 2.12, sorry.

3 **Q.** I got distracted. Did we move this into evidence?

4 Yes.

5 I'm going to show you now the evolution of 2.12 and I
6 believe that the, the next version can be found at P-253.

7 May I approach?

8 THE WITNESS: Thank you.

9 BY MR. FARRELL:

10 **Q.** Sir, do you recognize this document?

11 **A.** It appears to be the CSRA Policy 2.12.

12 **Q.** And does this appear to be the amendment of P-26293
13 dated May 8th, 2007?

14 **A.** It's revised May 8th, 2007, correct.

15 **Q.** It's the same policy, just a revised version on
16 May 8th, 2007?

17 **A.** Yes.

18 MR. FARRELL: Judge, I'd ask for admission of
19 P-253.

20 MR. NICHOLAS: No objection.

21 MS. MAINIGI: No objection.

22 THE COURT: Hearing no objection --

23 MR. HESTER: No objection, Your Honor.

24 THE COURT: -- it's admitted.

25 BY MR. FARRELL:

1 Q. Sir, again you'll recall, sir, that the Immediate
2 Suspension Order served by the DEA was on April 19th,
3 2007?

4 A. It was actually served on, I think it was April 24th.
5 The letter is dated April 19th.

6 Q. Sorry. In April of 2007 AmerisourceBergen was served
7 with an Immediate Suspension Order. And was this policy
8 enacted thereafter?

9 A. The policy was enacted in 2005. It was revised in
10 2007. It was always in place. The policy was in place at
11 the time of the suspension. It was revised on May 8th.

12 Q. Immediately after the Immediate Suspension Order but
13 prior to entering into the settlement agreement?

14 A. That's what the date would portray.

15 Q. I'm going to have you look at the very bottom of 253.
16 Can you read into the record the last sentence?

17 A. "Orders that are determined to be suspicious will be
18 reported to DEA without being shipped."

19 Q. Sir, on May 8th, 2007, did AmerisourceBergen adopt a
20 policy to block suspicious orders?

21 A. That's what the document indicates.

22 Q. I'm going to show you the next evolution which is
23 October 1st, 2008. It would be P-26292.

24 MR. FARRELL: Judge, may I approach?

25 THE COURT: Yes.

1 THE WITNESS: Thank you.

2 BY MR. FARRELL:

3 Q. Do you recognize this document, sir?

4 A. It appears to be the Order Monitoring Program CSRA
5 Policy 2.12 revised October 1st, 2008.

6 MR. FARRELL: Judge, at this time I'd ask for the
7 admission of P-26292.

8 THE COURT: Objection?

9 MR. NICHOLAS: No objection.

10 MR. HESTER: No objection, Your Honor.

11 THE COURT: It's admitted.

12 BY MR. FARRELL:

13 Q. I'll ask you to turn to Page 2 and look at
14 Paragraph 3. Will you read the first sentence, please?

15 A. You want me to read the paragraph?

16 Q. You can, sir.

17 A. "On a monthly basis CSRA will review a customer product
18 mix-report to help identify customers purchasing more than a
19 pre-determined percentage of controlled substances versus
20 non-controlled substances. CSRA will investigate and
21 identify customers whose purchasing activity warrants
22 further review."

23 Q. I'm going to put a pin in this and we're going to flip
24 to a different document. It will be P-2876. I'll give you
25 a minute to read it. This is an email that you're on the

1 chain.

2 MR. FARRELL: Judge, may I approach?

3 THE COURT: Yes.

4 THE WITNESS: Thank you.

5 BY MR. FARRELL:

6 Q. We'll keep this document up for a minute on the
7 screen while you review the other one, please.

8 (Pause)

9 Sir, I'm going to be asking you directly about the
10 email that you wrote on the bottom of Page 2. But, in
11 general, do you recognize this document?

12 A. I, I -- yeah, I mean, I wrote this email it looks like.

13 Q. This is an email that you wrote. What is the date of
14 it?

15 A. May 21st, 2008.

16 Q. Who did you send it to?

17 A. I sent it to the divisional RVPs.

18 Q. Sir, will you, will you tell the Court what a
19 divisional RVP is?

20 A. So outside of the CSRA structure we went over
21 yesterday, the business structure itself is the, is the
22 regional structure which has a Regional Vice President in
23 charge of all operations for the distribution centers within
24 their region. That's sales, operations.

25 Q. And would this be to all of the Regional Vice

1 Presidents including the Lockbourne, Ohio, facility?

2 **A.** They would have, they would have been included.

3 **Q.** Okay. Now, when you look at the email that you sent --

4 Can we bring up 2876, the bottom of Page 2, please.

5 Do you see the email that starts with "From Chris
6 Zimmerman"?

7 **A.** Are we on the second page?

8 **Q.** Bottom of Page 2.

9 **A.** Yes.

10 **Q.** This is an email from you; correct?

11 **A.** Correct.

12 **Q.** This is an email that you sent in your capacity as the
13 Senior Vice President of CSRA at AmerisourceBergen; correct?

14 **A.** I think I was VP at the time but, yes.

15 **Q.** And this is a type of email that you would have sent to
16 your subordinates in the course of your job
17 responsibilities; correct?

18 **A.** Yes.

19 **Q.** You say there in the first paragraph starting, "One of
20 the reports," will you read that into the record, please?

21 **A.** "One of the reports that CSRA's diversion control group
22 reviews on a monthly basis is the percentage of controlled
23 substances to all Rx that a customer purchases from ABDC.
24 The average retail pharmacy purchases between 5 and
25 15 percent controlled substances. In our DEA negotiations,

1 DEA indicated that one sign that a pharmacy may be diverting
2 controlled substances is if a pharmacy purchases a high
3 percentage of controlled substances."

4 **Q.** Will you go to the bottom of the page with the
5 statement, "Would it not make sense."

6 **A.** Want me to read it out loud?

7 **Q.** Please.

8 **A.** "Would it not make sense that if ABDC is going to
9 assume the risk of supplying these customers with their
10 controlled substances, shouldn't ABDC also receive the
11 benefit of supplying these customers with the low risk
12 product as well?"

13 **Q.** Now, I'd like to flip back to Policy CSRA 2.12 dated
14 October 1st, 2008. I'd like to now go to Paragraph 8 which
15 is the top of Page 3. I'll give you a second to read it.

16 (Pause)

17 Have you read it, sir?

18 **A.** Just a second. Just eight; right?

19 **Q.** Just eight.

20 **A.** Okay.

21 MR. FARRELL: Will you pull it up, please? 26292,
22 Page 3, Paragraph 8. Thank you. The whole paragraph,
23 please.

24 BY MR. FARRELL:

25 **Q.** Will you read the first sentence, please.

1 **A.** "The standard ABC will use is whether it is more likely
2 than not that the customer is permitting controlled
3 substances to be illegally diverted, whether knowingly or
4 due to its negligence in complying with its legal
5 obligations for professional practice".

6 **Q.** Stop there for a second. So this is a policy effective
7 October of 2008 that you would be looking at the conduct of
8 the pharmacy when filling prescriptions when enforcing your
9 regulatory responsibilities. Agreed?

10 **A.** I mean, you've added prescriptions. We would be
11 looking at their purchasing patterns and history, not the
12 actual practice.

13 **Q.** So then when you go to the next sentence, would you
14 please read it?

15 **A.** "If so, ABC will cut off further sales of controlled
16 substances or listed chemicals that appear are being
17 diverted."

18 **Q.** This is an acknowledgment that if your OMP system flags
19 an order as suspicious that you will cut off sales to that
20 customer until you've resolved that suspicion. Agreed?

21 **A.** Yeah.

22 **Q.** If you go down and look at the, the first, or the next
23 sentence.

24 **A.** "Decisions will be made on a case-by-case basis and
25 will depend upon a full consideration of the circumstances

1 including --" Want me to -- it runs through all the
2 different things to consider.

3 **Q.** Yeah. The ones that I guess I would particularly be
4 interested in is the first one is you'd look at the ordering
5 patterns of the customer; correct?

6 **A.** That's what it says, ordering patterns of the customer.

7 **Q.** And you'd look at the product mix and the size and
8 frequency of the orders?

9 **A.** Yes.

10 **Q.** And you would look at whether or not the customers of
11 the pharmacy are primarily paying in cash? Whether patients
12 are disproportionately cash customers?

13 **A.** Okay, I see that.

14 **Q.** You would be looking at the customers of your customer?

15 **A.** We would be looking at the, the -- how -- and this is
16 in the due diligence portion of the, of the program, not an
17 ongoing basis, but to get an understanding of the type of
18 business that we're going to be opening up.

19 **MR. FARRELL:** Judge, at this point I'd like to
20 move for admission of P-26292 as well as P-2876.

21 **THE COURT:** Any objection?

22 **MR. NICHOLAS:** No objection.

23 **MR. HESTER:** No objection, Your Honor.

24 **MS. MAINIGI:** No objection, Your Honor.

25 **THE COURT:** It's admitted.

1 BY MR. FARRELL:

2 Q. For purposes of completeness, I'm going to look at
3 P-253.

4 MR. FARRELL: Judge, while I'm sorting this out,
5 I'll proffer for the record that there is one further
6 amendment to 2.12. It's dated January 5th, 2010. It's
7 P-253 that we'll circle back to.

8 BY MR. FARRELL:

9 Q. Okay. The next document that I'm going to show
10 you, Mr. Zimmerman, is P-187.

11 MR. FARRELL: May I approach?

12 THE WITNESS: Thank you.

13 BY MR. FARRELL:

14 Q. For reference for the Court, this is a document --
15 a memorandum purportedly written by you dated June 29th,
16 2007. The subject matter is "Update: OMP Distribution
17 Center Procedures." I'll give you a minute to read
18 that.

19 (Pause)

20 Sir, are you ready?

21 A. Yes.

22 Q. Do you recognize this document?

23 A. It is a memorandum I -- appears I wrote on June 29th,
24 2007.

25 Q. And who did you send it to?

1 **A.** Distribution Center Associates.

2 **Q.** Now, what, what is the title of the document?

3 **A.** "OMP Distribution Center Procedures."

4 **Q.** And is it fair to say this is a memorandum that you
5 drafted and circulated to the distribution center associates
6 regarding the new updates to your OMP policy?

7 **A.** Correct.

8 MR. FARRELL: Judge, at this time I'd ask for the
9 admission of P-187.

10 MR. NICHOLAS: No objection.

11 MR. HESTER: No objection, Your Honor.

12 MS. MAINIGI: No objection, Your Honor.

13 THE COURT: It's admitted.

14 BY MR. FARRELL:

15 **Q.** This document was circulated a week after your
16 settlement agreement with the DEA? The DEA settlement
17 agreement is dated June 22nd, 2007. It's P-9. And this
18 document would have been written a week later?

19 **A.** Yes.

20 **Q.** I'm going to ask you to look on Page 2.

21 **A.** And just to clarify, it did come from me and also the
22 operations person, Frank Napoli. I just noticed that. It
23 wasn't just from me. It was a joint memo from me and
24 operations.

25 **Q.** Yes, sir. Thank you.

1 On Page 2, the first paragraph, the second to last
2 sentence, will you read aloud the second to the last
3 sentence in this memo that you sent to all the distribution
4 centers?

5 **A.** Orders that -- sorry. "Orders that are investigated by
6 CSRA will be reported to the Drug Enforcement
7 Administration."

8 **Q.** I'm sorry. Continue.

9 **A.** "CSRA will also review released and cancelled orders to
10 confirm they are being handled consistently and
11 appropriately."

12 **Q.** This is the sentence I was trying to get to. Will you
13 read the next sentence, please?

14 **A.** "All subsequent orders that continue to exceed the
15 monthly threshold will be rejected from processing until the
16 OMP held item is released."

17 **Q.** This is, again, a memorandum that you sent to the
18 distribution centers that if a customer exceeds the monthly
19 threshold, they're going to reject all other items from the
20 customer until you clear it. Correct?

21 **A.** Correct.

22 **Q.** Now I'm going to have you flip to the second to last
23 page. And it's hard to see, so maybe we can -- right there.
24 No, back up. There we go.

25 This is a diagram from your memorandum. And is this

1 a -- I guess we would call it a flowchart of the order
2 monitoring process that you were adopting in June of 2007?

3 **A.** Correct.

4 **Q.** And you'll see that there's a decision matrix that
5 happens once the orders are placed and flagged at
6 AmerisourceBergen distribution centers. Agreed?

7 **A.** Agreed.

8 **Q.** And I'm assuming here, since we don't have a color
9 copy, that where I'm going to point right here with this
10 blacked out, blacked out section, do you see the triangle
11 "Does order pass initial interrogation?" "Pass." And what
12 would you guess would be in that black box? Fail?

13 **A.** Hold, yeah. I'm not sure.

14 **Q.** Non-pass?

15 **A.** I guess. I'm not sure what it says. I can't recall.

16 **Q.** That would indicate that your, your electronic
17 monitoring algorithm has flagged something; correct?

18 **A.** Correct.

19 **Q.** And that it would be subject to your division doing due
20 diligence; correct?

21 **A.** There's one quick -- the DC staff is a step before it
22 gets to the -- to my group.

23 **Q.** Very good. And then I would like to highlight on the
24 far right, it says, "Hold current and all future orders from
25 customer of like items."

1 This is in your system that if you get a suspicious
2 order from a customer, the account is frozen until you clear
3 it through due diligence. Agreed?

4 **A.** Of like items, same product family, correct.

5 **Q.** That's a great point. Not all of the items, just the
6 base code; for instance, all oxycodone products?

7 **A.** I believe so. I'm not, I mean, --

8 **Q.** Or hydrocodone products?

9 **A.** By reading that, that's how I would interpret it.

10 **Q.** Would you, would you think that it applied to all
11 opioids or would you have divided it out between, say,
12 fentanyl patches, oxycodone pills, hydrocodone pills?

13 **A.** It would -- again, remember, this is at the beginning
14 of our trial as we're working on the program with DEA. It
15 was after we signed our agreement but before they released
16 our license.

17 So we had two months that we were working through any
18 kinks that we identified. This was the initial
19 out-of-the-chute program we put in place. And over the next
20 couple months, we continued to fine-tune it with DEA until
21 it got to where they liked it.

22 MR. FARRELL: Judge, cleaning up now, I believe I
23 now have the last iteration that I intend to present to the
24 Court of 2.12. It's P-44002. May I approach?

25 THE WITNESS: Thank you.

1 BY MR. FARRELL:

2 Q. Without belaboring the point, sir, what is this
3 document and what did it replace and when was it
4 effective?

5 A. It looks like it's a revised version of CSRA .2 -- 2.12
6 that was revised on January 5th, 2010.

7 MR. FARRELL: Judge, at this time we would move
8 for admission of the document.

9 THE COURT: Any objection?

10 MR. HESTER: No objection.

11 MR. NICHOLAS: No objection, Your Honor.

12 THE COURT: Hearing no further objection, it's
13 admitted.

14 MR. FARRELL: Judge, I'm going to take a small
15 detour now before we get into the two other black flags and
16 talk a little bit about corporate culture.

17 With your indulgence, I'd like to circulate P-212.

18 MR. NICHOLAS: Your Honor, I will object to the
19 characterization of the evidence to come, whatever he's
20 going to ask.

21 THE COURT: Yeah, sustained.

22 MR. FARRELL: Judge, may I approach?

23 THE COURT: Yes.

24 BY MR. FARRELL:

25 Q. Sir, do you recognize this document?

1 **A.** Looks like an email string.

2 **Q.** Involving who?

3 **A.** It starts with Joe Tomkiewicz to Ed Hazewski and then
4 to Julie Eddy.

5 **Q.** This is an email that you received in the course of
6 your role as Senior Vice President of CSRA at
7 AmerisourceBergen?

8 **A.** I received this email, yes.

9 **Q.** And this email came from and involved individuals that
10 report to you and are in charge of CSRA and suspicious order
11 monitoring in places including Huntington/Cabell County,
12 West Virginia?

13 **A.** Yes.

14 MR. FARRELL: Judge, I'd ask for admission of
15 P-212.

16 THE COURT: Is there any objection to that?

17 MR. NICHOLAS: No objection.

18 BY MR. FARRELL:

19 **Q.** Mr. Zimmerman -- I'm sorry.

20 MR. HESTER: No objection, Your Honor.

21 THE COURT: Ms. Mainigi.

22 MS. MAINIGI: No objection, Your Honor.

23 THE COURT: Okay. It's admitted.

24 BY MR. FARRELL:

25 **Q.** Mr. Zimmerman, what is this email?

1 **A.** It looks like a parody, a poor excuse of a parody I
2 would think. I'm not sure. I don't know if it came from a
3 paper or where it was, where it came from, but it's a parody
4 of the opioid abuse situation at the time.

5 **Q.** Did you endorse the parody?

6 **A.** No, I don't endorse it. I think it's a reflection of
7 the environment, not, none whatsoever. I forwarded it to
8 our government affairs person. We are working with the
9 government agencies and the states making, giving them as
10 much information as we can on what we receive.

11 My diversion people said Google alerts, they get things
12 that come in with certain buzz words. But I'd rather them
13 not forward this on. If it was a business purpose to alert
14 people to what, what you're seeing in the social media or on
15 the internet is one thing. But if it was as a, as taking
16 things not seriously, I would definitely not support that.

17 **Q.** Well, the email that you -- the top of the chain you
18 sent this email to Julie Eddy. And who is Julie Eddy?

19 **A.** Julie Eddy is a state government affairs person used to
20 work for the Florida Department of Health.

21 **Q.** And it says there, "I sent this to you a month or so
22 ago. Nice to see it recirculated," smiley face. So I take
23 it you had received this earlier?

24 **A.** No, I had -- I don't recall ever receiving it earlier.

25 **Q.** I'm going to next reference P-17046, 17046. Don't

1 bring it up yet, please.

2 MR. FARRELL: Judge, may I approach?

3 BY MR. FARRELL:

4 Q. Sir, do you recognize this document?

5 A. Yes. It's an email from me to government affairs at
6 had.

7 Q. And did you cut and paste the parody and then forward
8 it to had?

9 A. It appears that -- it appears that way.

10 Q. In fact, you did forward it on?

11 A. I forwarded -- yes, I forwarded it on to government
12 affairs, correct. I forwarded it on to Julie Eddy within
13 our government affairs because they are the ones that are
14 lobbying at the state and working on regulations on opioids.
15 And, so, I feel that anything out -- that any information I
16 have I share with them, yes.

17 Q. Will you bring up P-17046, please.

18 So the title of this is "Saw This And Had To Share It."
19 Do you see that?

20 A. Yes.

21 Q. And this is a parody sung to the tune of *The Beverly*
22 *Hillbillies*. Do you know what *The Beverly Hillbillies* is?

23 A. I do.

24 Q. What is it?

25 A. It was a TV show.

1 **Q.** There was an opening intro to the song; correct?

2 **A.** Yes.

3 **Q.** So somebody has rewritten the lyrics to this song and
4 then turned it into a parody and it circulated amongst your
5 CSRA department. Agreed?

6 **A.** It was circulated in my department, through my
7 department, yes. And I forwarded it on to the government
8 affairs folks, yes.

9 MR. FARRELL: Judge, I'd ask for both P-212 and
10 P-17046 be admitted into the record.

11 THE COURT: Any objection?

12 MR. NICHOLAS: No objection.

13 MR. HESTER: No objection.

14 MS. MAINIGI: No objection.

15 THE COURT: It's admitted.

16 BY MR. FARRELL:

17 **Q.** All right. Aside from the parody, I think that I'd
18 like to use it as a vehicle to discuss a couple of
19 topics.

20 The first thing I'd like to identify -- I hope I get
21 this right -- it's to the tune of *The Beverly Hillbillies*,
22 but it says "A poor mountaineer." Do you see that?

23 **A.** I see that.

24 **Q.** Sir, do you acknowledge that here in West Virginia that
25 we sometimes recognize ourself or refer to ourselves as

1 Mountaineers?

2 **A.** Yes.

3 **Q.** Do you know what the mascot for West Virginia
4 University is?

5 **A.** Mountaineers.

6 **Q.** And it's making a reference to keeping his habit fed.
7 But what, what I'm particularly interested in is this last
8 sentence. Will you read that aloud, please?

9 **A.** "About pills that is, Hillbilly heroin"? That one?

10 **Q.** Yes. Then it says "OC." Do you know what OC means?

11 **A.** Yeah. The term early on Oxycontin, what is also
12 referred -- I have seen in several articles as hillbilly
13 heroin, yes.

14 **Q.** So you'll recognize or acknowledge that at least in
15 2011 hillbilly heroin and pills, prescription pills have
16 some reference point to each other?

17 **A.** What's the question? What -- could you repeat the
18 question, please?

19 **Q.** Do you know what hillbilly heroin is?

20 **A.** Hillbilly -- I've heard Oxycontin referred to as
21 hillbilly heroin, yes.

22 **Q.** So in common parlance, you understand that there is a
23 connection between the reference in this parody you
24 circulated between hillbilly heroin and prescription
25 opiates?

1 **A.** Right, to the government affairs folks I did. That's
2 correct.

3 **Q.** Now, the next thing it says is it says "Pain clinics,
4 cash and carry."

5 Again, in 2011 you are acknowledging and recognizing
6 that a source of prescription pills or hillbilly heroin are
7 pain clinics that have cash and carry?

8 **A.** I forwarded this parody on to the government affairs,
9 yeah. I don't even know if I read the whole thing. Again,
10 it was the context of the environment that we were under. I
11 forwarded it on to them.

12 Mainly, it was -- Florida had regulations that we were
13 looking at at the time. And it was, you know, relevant.
14 Florida was mentioned in the parody.

15 **Q.** And the reason it was mentioned was that the story of
16 this is that Mountaineers are driving down to Florida to get
17 pills; correct?

18 MR. NICHOLAS: Your Honor, I'd like to just object
19 only to the extent that the witness is being -- starting to
20 be asked to do a lot of interpreting. I'm letting him
21 answer questions about the parody without a lot of
22 objecting, but we're getting close to just sort of
23 de-constructing something which is not really what he's
24 testifying about.

25 THE COURT: Well, I'll overrule the objection and

1 you can ask him, Mr. Farrell.

2 THE WITNESS: So what was the question?

3 BY MR. FARRELL:

4 Q. This is an implicit recognition that there was pill
5 migration from Florida up into Mountaineer land?

6 A. Somebody wrote a parody that included that, yes.

7 Q. Now, this is the other thing. "A bevy of pillbillies."
8 What does a "bevy of pillbillies" mean to you, sir?

9 A. A lot of pill -- a lot of pillbillies. I mean, the
10 pillbilly term I've seen, or referenced as individuals that,
11 that -- usually it's the people that go down and pick up the
12 drugs and then resell them. It's the -- I don't know the
13 words, dealers, not, not the actual unfortunate patients,
14 the victims.

15 Q. And then the final refrain here is, "Pill mills, that
16 is. Buy some pills. Take a load home."

17 Again, this is a recognition. Have you heard of the
18 Blue Highway?

19 A. I heard that reference in the deposition, the Blue
20 Highway. Yeah, I think that's what one of the terms was
21 used for that -- moving it from -- moving it up from
22 Florida.

23 Q. How about Oxy Express?

24 A. I'm sure I've heard that -- I mean, over the years I'm
25 sure I've heard that term as well or have seen it before.

1 **Q.** Next is P-17051. Don't bring it up yet, please.

2 MR. FARRELL: May I approach, Judge?

3 THE WITNESS: Thank you.

4 BY MR. FARRELL:

5 **Q.** Sir, do you recognize this document?

6 **A.** It appears to be an email from me to a large group. It
7 looks like most of them are CSRA it appears to be and some
8 operations as well.

9 **Q.** What's the date?

10 **A.** It is August, 2007.

11 **Q.** What's the subject line?

12 **A.** "Article on Rogue Pharmacies."

13 **Q.** Sir, is this an email that you forwarded on to those in
14 your CSRA division on August 23rd, 2007?

15 **A.** Yes.

16 **Q.** This is shortly after the enactment of your reformed
17 OMP program; correct?

18 **A.** Correct.

19 **Q.** Shortly after you entered into a settlement agreement
20 with the DEA?

21 **A.** Correct.

22 **Q.** Shortly after you sent the July, 2000 letter by counsel
23 to DEA promising to do better; correct?

24 **A.** What was that last question?

25 **Q.** You promised the DEA to do better in your July, 2007

1 letter?

2 MR. NICHOLAS: I'll object to the, object to the
3 question. There's no foundation for that and it's a
4 mischaracterization.

5 THE COURT: I'll sustain the objection, Mr.
6 Farrell.

7 MR. FARRELL: Will you bring up P-17051.

8 BY MR. FARRELL:

9 Q. In this email you'll see down at the bottom that a
10 newspaper article from the Associated Press is reporting
11 from Charleston, West Virginia, in 2007. Do you see
12 that?

13 A. Yes.

14 Q. And you received this and then you forwarded this
15 article to your CSRA diversion. Agreed?

16 A. Yes.

17 Q. So I really don't know the answer to this. Do you have
18 somebody that is filtering through looking for news
19 articles?

20 A. Google alerts. So if you put in a Google alert for
21 hillbilly heroin, pillbilly, opioids, heroin, any article or
22 anything that comes up, pops up in your email to one of
23 these folks.

24 And you'll see and we -- hundreds of thousands of
25 documents and millions of pages you'll see through our

1 emails, you'll see a lot of these forwarding processes going
2 on.

3 So when an article pops up -- and, again, part of it is
4 trying to get everyone to understand what the environment we
5 were in. And, so, these things pop up, this article I
6 received. And then, again, for educational purposes we
7 forward it to the diversion control group. To this day, I
8 probably get 10 emails a day from this group forwarding on
9 something that they picked out from the internet.

10 **Q.** So let's read what you wrote.

11 Scroll up, please. Other direction. All the way.
12 There we go.

13 Starting with "not only," will you read what you wrote
14 into the record?

15 **A.** "Not only is this part of the country purchasing the
16 majority of hydrocodone from legitimate pharmacies, but they
17 also buy a huge quantity from illegal on-line pharmacies.
18 There is a whole lot of pain in the Appalachia area."

19 MR. FARRELL: Judge, at this point I'd like to put
20 P-17051 in the record.

21 MR. NICHOLAS: No objection.

22 MR. HESTER: No objection, Your Honor.

23 MS. MAINIGI: Your Honor, I'm assuming that the
24 article that's included here is not being offered for the
25 truth because it is hearsay.

1 THE COURT: What are you offering it for?

2 MR. FARRELL: Notice that there was a huge
3 quantity of opium pills being sold in the Appalachia region.

4 THE COURT: Okay. It's admitted for that purpose.

5 MS. MAINIGI: Your Honor, I think that is the --
6 that's the truth of the article I guess that he's trying to
7 get it admitted for. I mean, certainly I don't have any
8 objection to the Chris Zimmerman part of the email but I
9 think the article is hearsay.

10 MR. NICHOLAS: And I would only add that that
11 description that Mr. Farrell just gave is not really
12 reflective of what Mr. Zimmerman wrote, which is that he
13 said a huge quantity from illegal on-line pharmacies.

14 So if we're going to characterize the document on the
15 record -- characterize what Mr. Zimmerman said, I would at
16 least like it to be accurate in that way.

17 THE COURT: Well, I'm going to admit it for
18 Mr. Zimmerman's -- showing Mr. Zimmerman's state of mind at
19 the time he distributed this newspaper article. It doesn't
20 come in for the truth of the matter asserted in the article.

21 MR. FARRELL: Yes, sir, Your Honor.

22 The next document is P-282.

23 Judge, may I approach?

24 THE WITNESS: Thank you.

25 BY MR. FARRELL:

1 Q. Sir, do you recognize this document?

2 A. It's an email from me to several different people and
3 different departments it looks like on May 6th, 2011.

4 Q. And, so, you mentioned earlier that there was reference
5 to you forwarding on information to your government affairs
6 person, Julie Eddy.

7 A. Yeah.

8 Q. Do you see down below that there's reference to the
9 Florida reforms?

10 A. Yes.

11 Q. And is this one of the reasons why you would keep your
12 legislative affairs person in the loop as to what's
13 happening on the ground?

14 A. So she -- yes. She forwarded this to me, what was
15 changing, and then I forwarded it on that we're going to
16 start seeing increases in -- in poorly worded terms, we're
17 going to see -- we could see larger increases in Georgia and
18 Alabama.

19 Q. And, so, when you look at the bottom half of it,
20 without going into great detail, this is a summary by Julie
21 Eddy to you, among others, that is summarizing the reforms
22 in 2011 in Florida to address illicit opioid abuse. Agreed?

23 MS. MAINIGI: Objection, Your Honor. I'm not sure
24 what the relevance is of this line of questioning on this
25 document that relates to Florida.

1 THE COURT: Well, I'm going to let him continue.
2 We'll see where it leads.

3 MR. FARRELL: Thank you, Your Honor.

4 THE COURT: It may not be relevant.

5 MR. FARRELL: P-282. Would you bring it up,
6 please.

7 BY MR. FARRELL:

8 Q. So following the idea that you're communicating
9 with legislative affairs, legislative affairs was
10 explaining to you in general some reform action. It
11 doesn't matter what it is. Will you read into the
12 record what your response was?

13 A. "Watch out George and Alabama. There will be a mass
14 exodus of pillbillies heading north."

15 Q. Did you take any action as CSRA to watch out for a mass
16 exodus of pillbillies heading north?

17 A. We -- again, the purpose -- it is poorly written and,
18 you know, I shouldn't have sent the email. Definitely the
19 term "pillbillies" is not an appropriate term to be using in
20 an email. And, you know, sorry for that.

21 But I just wanted to again alert, alert the people that
22 they need to be on the watch-out in Alabama and Georgia was
23 the intent. Poorly executed, poorly stated, and
24 inappropriately said.

25 MR. FARRELL: Judge, I'd move for P-282 into the

1 record.

2 MS. MAINIGI: I renew my objection, Your Honor.

3 THE COURT: I'll show your objection.

4 MR. HESTER: Your Honor, I'd also say it's, it's
5 hearsay as to the recitation of these elements of the
6 legislation.

7 THE COURT: Well, you're offering it to -- for the
8 purpose of showing Mr. Zimmerman's attitude at the time this
9 happened. Is that right?

10 MR. FARRELL: Yes, Your Honor.

11 THE COURT: I'll admit if for the limited purpose
12 and the objections will be shown on the record.

13 MR. FARRELL: Next document is P-217. May I
14 approach, Judge?

15 THE COURT: Yes.

16 THE WITNESS: Thank you.

17 BY MR. FARRELL:

18 **Q.** Sir, do you recognize this document?

19 **A.** It looks like -- it doesn't look like. It's an email
20 from Julie Eddy to me in February, 2011.

21 **Q.** What's the subject line?

22 **A.** "Oxycontinville."

23 **Q.** And what's -- is it -- what's it referencing? What is
24 this document?

25 **A.** It, it looks like a parody. And my assumption is this

1 is the one which she sent me -- one of the other emails you
2 said -- there was an email that she said I think I sent this
3 to you before. I think she probably was referencing this
4 email. But it's, again, a parody.

5 **Q.** Can you bring up 217, please.

6 Are you familiar with Jimmy Buffet's song
7 *Margaritaville*?

8 **A.** I am.

9 **Q.** Can you scroll down to beginning with the line, "I
10 drove from Kentucky."

11 There you go. Thank you.

12 I'm going to -- I'm just going to make a little box
13 here. I'm just going to reference again and use this as a
14 reference point.

15 This is a 2011 document. In the first line do you see
16 where it says, "I drove from Kentucky"?

17 **A.** Yes.

18 **Q.** Now you understand how far we are now from Kentucky
19 sitting here?

20 **A.** Yes.

21 **Q.** And that Huntington/Cabell County is -- it actually
22 abuts Kentucky on the other side of the Big Sandy River. Do
23 you understand that?

24 **A.** Yes. I understand Kentucky is adjacent to West
25 Virginia.

1 **Q.** It's called the Tri-State area. It says, "I drove from
2 Kentucky, hoped to get lucky, stockpiling meds for me and
3 for you, they're a real measure of drug-dealer treasure, how
4 I'll drive home, I haven't a clue."

5 That's what it says, isn't it?

6 **A.** That's what it says.

7 **Q.** And this is the exchange between you and Julie Eddy who
8 is the Director of State Government Affairs at
9 AmerisourceBergen?

10 **A.** She forwarded this to me, yes.

11 MR. FARRELL: Judge, I'd ask for 217 to be
12 admitted into the record.

13 THE COURT: Is there any objection?

14 MR. NICHOLAS: No objection.

15 MR. HESTER: No objection, Your Honor.

16 THE COURT: Ms. Mainigi?

17 MS. MAINIGI: No objection.

18 THE COURT: All right. It's admitted.

19 BY MR. FARRELL:

20 **Q.** Next is going to be 234, P-234.

21 Sir, do you recognize this document?

22 **A.** I didn't get one.

23 **Q.** Oh.

24 MR. FARRELL: Judge, may I approach?

25 THE COURT: Yes, you may.

1 THE WITNESS: Thank you.

2 BY MR. FARRELL:

3 Q. Sir, do you recognize this document?

4 A. It looks like an email, but let me --

5 Q. Who is the email from?

6 A. Looks like an email string that starts from Stacie
7 Heller in our government affairs group.

8 Q. Okay. Is it fair to say that it's an email that
9 basically summarizes some media reports as well as responses
10 to some media reports?

11 A. That's what it appears to be, yes.

12 Q. That's not of particular interest to me. What is of
13 interest is that this is a communication dated March 14th,
14 2017, from Steve Mays to you; correct?

15 A. Yes.

16 Q. Steve Mays works under you in your chain of command?

17 A. He does.

18 Q. And, so, your conduct and your behavior, would you
19 agree with me, has an influence on the corporate culture
20 within CSRA?

21 A. Yeah. And, and, you know, I'm sure you're going to
22 probably show me some more emails. But I can tell you the
23 culture at ABC is of the highest caliber. And if you pick
24 some emails out of hundreds of thousands of emails and
25 millions of pages of documents and some of them, you know,

1 are educational but some of them, unfortunately, I would
2 have rather they didn't circulate some of the information.

3 But by no means does it, does it demonstrate the, the
4 level of work and the amount of time and responsibilities
5 they put forth to their daily functions to make sure they
6 clear those orders so that the, the pharmacies are receiving
7 the products for the patients.

8 And we have to cover from Puerto Rico to Hawaii which
9 is a huge span and we're clearing orders all night long.
10 And these people email back and forth quite a bit.

11 And, you know, I wish they wouldn't send those type of
12 emails. Unfortunately, they did and, you know, I can
13 apologize for that behavior. But it was sent in a joking
14 manner and not as a, as a description of the environment
15 they're under.

16 But, I mean, I'll sit here and you can show me more
17 emails and I'll respond to them. But, you know, I think
18 some of the frustration our team has is that we've been
19 working tirelessly -- I've been doing it for 31 years for
20 the whole reason to keep the supply chain safe and secure.

21 And whether you, whether you -- I take it personally
22 when you attack my credibility that way. I think I've built
23 that 31 years of work product. Hopefully I've demonstrated
24 that here today on the stand.

25 But I'll sit here and see some more of these emails and

1 I'll address them the best I can. And, you know, I do
2 apologize to the Court for some of the language and some of
3 the things that are contained in them. But, unfortunately,
4 through the, the 15, 20 years we've been in this opioid
5 crisis, there's been a lot of information change hands.

6 **Q.** Sir, the typed message from Steve Mays to you in P-234
7 is, "I guess if all the distributors shipped shipping
8 controlled substances into West Virginia, the problem would
9 be solved. Correct?"

10 Did I read that accurately?

11 **A.** That's the comment he made sarcastically.

12 MR. FARRELL: Judge, I'd ask for 234 to be
13 admitted into the record.

14 MR. HESTER: Your Honor, we object to this
15 document being admitted into evidence. It has a very
16 extensive set of material underneath the note from Mr. Mays
17 to Mr. Zimmerman that deals with legislative and lobbying
18 activity in Washington.

19 We have a motion pending on this to exclude evidence of
20 petitioning activity, legislative activity, lobbying,
21 litigation activity engaged in by the trade association that
22 is protected by First Amendment petitioning activity and,
23 therefore, is not properly admissible.

24 MS. MAINIGI: Your Honor, I join in that
25 objection. Obviously there's an article attached that

1 should not be offered.

2 MR. NICHOLAS: I join.

3 THE COURT: Well, this contains a bunch of stuff
4 in here that's not relevant and not admissible, doesn't it,
5 Mr. Farrell?

6 MR. FARRELL: Judge, I'd like to put a pin in
7 this. My colleague, Mr. Majestro, is in the process of
8 briefing this. We, we have a lively dispute, Judge, about
9 whether or not the lobbying efforts by the trade group and
10 the Big Three are admissible in this trial. It was -- there
11 was a ruling in CT1. There's not a ruling yet here. I'd be
12 glad to stick a pin in this to come back to it.

13 THE COURT: Well, I'm going to sustain the
14 objection to this document, Mr. Farrell.

15 MR. FARRELL: Yes, sir.

16 BY MR. FARRELL:

17 Q. I'd like to bring up P-268.

18 May I approach, Your Honor?

19 THE COURT: Yes.

20 THE WITNESS: Thank you.

21 BY MR. FARRELL:

22 Q. Sir, do you recognize this document as another
23 correspondence amongst those that work under your
24 command at CSRA?

25 A. I do.

1 Q. It's dated September 13th, 2012?

2 A. Yes.

3 Q. Will you please pull up P-268 on the, on the screen.

4 Sir, this is a document, is it not, again where Julie
5 Eddy is summarizing this time the forms in Kentucky?

6 Agreed?

7 A. No, this looks like -- well, there's --

8 MS. MAINIGI: Your Honor, may I just put in an
9 objection? We don't see Mr. Zimmerman on this document
10 anywhere. I don't think a foundation has been laid for it.

11 THE COURT: Yeah, you need to lay a foundation,
12 Mr. Farrell.

13 MR. FARRELL: Judge, this is a stipulated document
14 by AmerisourceBergen. That's the reason why we did not
15 subpoena Cathy Marcum.

16 MR. HESTER: Your Honor, the stipulation did not
17 stipulate as to foundation. There was a stipulation on
18 authenticity, not foundation.

19 MR. FARRELL: Judge, --

20 THE COURT: I'll sustain the objection unless you
21 can clear it up, Mr. Farrell.

22 MR. FARRELL: I have the stipulation in my hand.
23 This document is on the stipulation. And the stipulation
24 includes that we can present this through Chris Zimmerman,
25 Steve Mays, David May and/or Michael Perry. I'm going to

1 spend about 10 seconds on it.

2 MR. NICHOLAS: Well, they, they can use the
3 document, but they still have to establish that he knows
4 about it.

5 THE COURT: Yeah.

6 MR. FARRELL: We've --

7 THE COURT: How can you relate this to this
8 witness?

9 MR. FARRELL: Because he just testified, Your
10 Honor, that he would defend his staff and that there are
11 reasons or other purposes for some of these emails.

12 This is a continuation of the attitude that was
13 reflected in the earlier emails by leadership now being
14 circulated amongst --

15 THE COURT: Well, it's cumulative to that extent,
16 isn't it?

17 MR. FARRELL: Well, except this one is a little
18 more pejorative, Your Honor. This is one I would like for
19 him to take the opportunity to explain.

20 THE COURT: I'm going to sustain the objection.

21 MR. FARRELL: Withdraw this document and we
22 will -- we'll -- can I ask for the basis of your sustaining
23 the objection, Judge, for the record?

24 THE COURT: It's cumulative. You're, you're
25 showing what you obviously claim to be a cavalier attitude

1 on the part of, of this defendant towards the drug problem
2 and -- isn't that why you're offering it?

3 MR. FARRELL: Yes, Your Honor.

4 THE COURT: And this is cumulative to the other
5 documents and I'm not -- well, I don't want to comment on
6 the evidence, but I'm not sure how much this proves, you
7 know. People break the stress of their jobs by humor, and
8 this might be tasteless but I suppose it is relevant to the
9 company's attitude.

10 MR. FARRELL: That's my point, Judge.

11 THE COURT: This is cumulative and I'm going to
12 sustain the objection.

13 MR. FARRELL: Judge, I -- for the record, we're
14 trying to prove that it is more than just stress relief.
15 We're trying to establish that it is a pattern of conduct by
16 those people charged with protecting our community. And
17 they're circulating emails disparaging hillbillies.

18 THE COURT: Well, I've ruled on this, Mr. -- I've
19 ruled on this document, Mr. Farrell, and I probably said too
20 much about it. But go ahead.

21 BY MR. FARRELL:

22 Q. So the last document, the last document that I --

23 MR. FARRELL: I'm going to place a pin in this,
24 Judge, that we will attempt to revisit this document through
25 Steve Mays two witnesses from now without drawing your ire I

1 hope.

2 The last document before I have it published, I will
3 again reference P-174. This is the last of the chain of
4 documents, Judge. May I approach?

5 THE COURT: Yes.

6 THE WITNESS: Thank you.

7 MR. FARRELL: Judge, again this is an email in the
8 same cast as those previously referenced. And I will wait
9 and defer to the objection and your ruling before moving
10 forward on.

11 Judge, I will note that when we served this document on
12 the defendants, there was no objection placed in the counter
13 sheet.

14 MS. MAINIGI: Your Honor, I would like to put in
15 an objection if it's appropriate at this time for this
16 document. I didn't know if we were reserving on that.

17 But it's -- again, I do not see Mr. Zimmerman anywhere
18 on this email chain. It is now I think well beyond
19 cumulative, and I think we are now getting into the realm of
20 prejudicial.

21 MR. FARRELL: Judge, if I may, this document was
22 stipulated to in our stipulation and there was no objection
23 placed on the counter by the defendant.

24 THE COURT: Do you want to say something about it,
25 Mr. Nicholas?

1 MR. NICHOLAS: I'm torn. I really am. I think --
2 I mean, Mr. Zimmerman is not on the document. I don't -- to
3 me, it's not the biggest deal in the world if he tries to
4 answer about it. He has said what happened. You know, he
5 has expressed himself to the Court I think very well. And
6 I'm not sure that there's anything to be gained by
7 continuing on other than, other than the soundbite prejudice
8 aspect of it. So I guess I do object.

9 THE COURT: Mr. Hester.

10 MR. HESTER: Your Honor, I would add the fact that
11 there wasn't a specific objection can't waive the cumulative
12 objection that we've just made. It is cumulative as to the
13 other documents that have already been presented and there's
14 a lack of foundation.

15 THE COURT: I'll sustain the objection, Mr.
16 Farrell.

17 MR. FARRELL: Judge, this might be a good breaking
18 point.

19 THE COURT: Yeah. It's high noon. We'll be in
20 recess until 2:00.

21 You can step down, Mr. Zimmerman, and we'll be back at
22 2:00.

23 THE WITNESS: Thank you.

24 (Recess taken at 12:01 p.m.)

25 THE COURT: Mr. Majestro?

1 MR. MAJESTRO: Good morning (sic), Your Honor.
2 Mr. Ruby spoke this morning, so I figured I had to pop up
3 today.

4 THE COURT: Yes. We need to get you guys in the
5 game here, as if I don't know you have been in the game
6 already.

7 MR. MAJESTRO: So, this morning, we had an issue
8 regarding a document that the defendants asserted a First
9 Amendment privilege to. There was mention of briefing. The
10 briefing on that issue was complete as of yesterday.

11 I wanted to very quickly go over three points with Your
12 Honor on that issue because the witness -- we're going to
13 get into that issue again with Mr. Zimmerman's testimony.

14 First of all, I'd like to point out in the MDL, Judge
15 Polster twice rejected these defendants' arguments to
16 exclude evidence of lobbying activity based on the First
17 Amendment. Similarly, you have previously rejected this
18 argument.

19 In *Gillis v. Murphy-Brown*, one of the North Carolina
20 cases where Your Honor sat by designation, you -- you --
21 excuse me. You ruled as follows: "Although the
22 *Noerr-Pennington Doctrine* has been extended beyond the
23 antitrust context", which is where it was born, "it has not
24 been applied to bar otherwise admissible evidence in a state
25 law private nuisance lawsuit", which is exactly what we have

1 here.

2 In *Gillis*, Your Honor also ruled that, "The proper
3 remedy for those concerns is care in instructing the jury
4 with respect to what it must find in order to hold a
5 defendant liable and, if the defendant requests it, perhaps
6 also a curative instruction. The proper remedy is not
7 exclusion of evidence that is otherwise relevant and
8 admissible in connection with plaintiff's claims. Based on
9 the foregoing, it is clear that the evidence the defendant
10 seeks to exclude is not inadmissible under *Noerr-Pennington*.

11 Now, obviously, that reasoning applies even greater
12 here where there's no danger of having a jury confused. In
13 this case --

14 THE COURT: Well, as I understand it, the
15 *Noerr-Pennington Doctrine* holds that liability cannot be
16 imposed based on protected speech, but it doesn't bar its
17 admission for another purpose, such as evidence of intent;
18 is that right?

19 MR. MAJESTRO: And that's -- and we think it's
20 relevant both for intent and in terms to show concerted
21 action. We have alleged concerted action and conspiracy in
22 the pleadings in this case and the defendants' activities
23 with had weren't just lobbying. They were -- they are
24 evidence of that concerted activity.

25 And, finally, I'd say, Your Honor, if you have any

1 doubt, we'd encourage you to carefully look at all the
2 briefing in this case, but for today's purposes, we think
3 it's important for you to at least conditionally admit the
4 evidence.

5 THE COURT: Well, the briefing hasn't been
6 completed on this issue in this case.

7 MR. MAJESTRO: Yes, it has, Your Honor, as of last
8 night. As of last night, the defendants filed -- they filed
9 a reply.

10 THE COURT: Okay. Ms. Hardin, do you want to say
11 something?

12 MS. HARDIN: Well, Your Honor, I didn't appreciate
13 that we were going to have oral argument on this, on this
14 issue right now, but I'll just say we don't disagree, I
15 think, on the two main principles, which is it's not
16 admissible -- evidence of lobbying and other activities of
17 petitioning the government are not admissible to prove
18 liability. Plaintiffs admit that.

19 It may be in certain circumstances admissible to prove
20 another purpose, such as intent, but plaintiffs have not
21 proven that. I think, in their brief -- again, I don't have
22 it with me. I think they listed 12 items to which they said
23 it was related. Only one of those were actually petitioning
24 activity.

25 And so, they have not met their burden to show that the

1 things that Mr. Farrell specifically talked about in his
2 opening statements, which is filing an amicus brief and
3 other things that had to do with the had are relevant to any
4 purpose. In order for it to be relevant to concerted
5 action, it has to have been -- there has to have been
6 evidence of an agreement and it has to have been for an
7 unlawful purpose.

8 Plaintiffs haven't proven that here. They haven't even
9 put any of that in their brief. So, we agree with Mr.
10 Majestro. We encourage Your Honor to read the briefs and we
11 think that they make quite clear that the evidence that is
12 the subject of that motion is inadmissible for any purpose
13 that has been alleged in this trial.

14 And Judge Polster made a pretrial ruling about what
15 might be relevant if the plaintiffs could link it up by
16 showing intent. That case, of course, in Track 1 never
17 actually went to trial. No evidence was ever actually
18 admitted. And in the Track 3 case, when he issued an
19 amended ruling, these three defendants are not defendants
20 there and had nothing to do with the briefing that led to
21 that order.

22 THE COURT: Is this going to come up this
23 afternoon?

24 MR. MAJESTRO: Yes, sir. That's why, that's why
25 I'm raising it. And we just encourage you to hear the

1 evidence. If you find it's inadmissible later, we're sure
2 you're capable of forgetting it.

3 THE COURT: Okay. Just a minute.

4 (Pause)

5 THE COURT: Well, rather than -- Mr. Hester, do
6 you want to say something here, sir?

7 MR. HESTER: Well, I'm happy to speak to it, Your
8 Honor, but if you want -- I obviously want you to go first,
9 but I'm happy to speak to this. I -- we -- I did have some
10 substantive remarks in response to what Mr. Majestro said.

11 THE COURT: Well, my thinking was rather than slow
12 this down, I'd go ahead and allow the testimony subject to
13 me striking it after I read the briefs.

14 MR. HESTER: Well, Your Honor, our position is
15 this. First of all, we -- I think we're all in agreement
16 that the *Noerr-Pennington Doctrine* does not allow the
17 imposition of liability based on First Amendment petitioning
18 activity and I think the plaintiffs agree with us on that.

19 And that would extend to relying on petitioning
20 activities as a basis to establish a conspiracy. That's
21 substantive liability that they're seeking to establish
22 through conventional petitioning activity, lobbying,
23 legislative activity, filing of amicus briefs.

24 But, in addition, on this point of intent, this is
25 going to take us into a wide detour. This is -- this is a

1 big case already. This is going to take us into Washington
2 lobbying activity, Washington legislative activity, filing
3 of amicus briefs, participation in litigation, media and
4 press strategies. It's way afield.

5 And, Your Honor, we would submit that the problem
6 presented here is once we start down this path, we're on
7 another detour. We're into an area where the plaintiffs --
8 I agree with Ms. Hardin, plaintiffs don't have evidence that
9 connects this to intent except in relation to intent to
10 petition the government.

11 They don't have intent that ties to any activities in
12 Cabell-Huntington. They don't have any petitioning activity
13 that ties to the issues presented here in relation to public
14 nuisance.

15 And so, we're going to go off on a tangent that
16 requires the defense, of course, to respond. And so, I
17 think, unlike some of the other decisions the Court has made
18 which I've understood, to admit evidence and then figure it
19 out later, the problem that's presented is it's going to
20 take us into a lot of additional lines of evidence that
21 ultimately we think quite clearly are not going to be
22 relevant.

23 THE COURT: Mr. Nicholas?

24 MR. NICHOLAS: Well, I -- I agree with what's been
25 said and just the only thing I'll add is from the worm's eye

1 view, because I've got the witness on the stand, I would --
2 I would hope that -- I hope that, in this case, Your Honor
3 chooses the other path, you know, rather than letting the
4 evidence in conditionally, which I understand that approach,
5 but this is going to take time and it's going to be a detour
6 that is -- I would submit is not going to result in
7 anything. So, I hope that, at least on this one, we don't
8 take the normal -- the previous approach.

9 MR. MAJESTRO: I'd just like to say to conclude,
10 Your Honor, we think we can link it up through the
11 collection of all these witnesses. We have 30 days of trial
12 time. If we are wasting our time, that's going to be on us.

13 And the evidence that -- of what they did, you know,
14 essentially as we highlighted in the openings in the
15 beginning, the defendant said there isn't -- there was no
16 duty and we don't know what the duties were.

17 And then, there came a turning point where they -- they
18 got together and tried to change what the rules were. That
19 is -- the fact that they were doing that is not -- we're not
20 showing liability from the petitioning. Their decision to
21 do that shows their recognition and intent to act in a way
22 that's contrary to what they knew the law was.

23 MR. HESTER: But, again, Your Honor, we're talking
24 about intent to engage in petitioning activity. Intent to
25 seek changes in the DEA regulatory scheme. Intent to seek

1 changes in legislation. That's not going to be helpful
2 ultimately to the resolution of any issues related to a
3 public nuisance in Cabell-Huntington, but it's going to take
4 a fair amount of extra time, and it's going to take us into
5 a whole new realm of the Washington milieu of Trade
6 Association activity and allegations that somehow intent can
7 be defined from a decision to seek a change in a regulatory
8 structure. This is way afield from where we've been.

9 MR. MAJESTRO: We don't believe the evidence is
10 going to be that extensive on that point. And, again, the
11 intent is -- the intent is shown by their recognition of
12 what the law was and their intent to change it.

13 We're not saying they couldn't do it, but their act of
14 doing it is what shows that they -- that they knew what the
15 law was and they intended -- and they continued to violate.

16 And again, you know, we're happy to link this up as the
17 testimony goes on, but it's unfair, when we have these live
18 witnesses on the stand that are going to go home, we're not
19 going to be able to do it if Your Honor rules three weeks
20 down the road that we're right.

21 THE COURT: Well, specifically, how is it
22 relevant?

23 MR. MAJESTRO: So, what this evidence shows is
24 that after the defendant spent several years saying, well,
25 this isn't the law, we don't know what the law is, that they

1 recognized that it was the law and they tried to change it.
2 And so, that recognition shows -- shows their intent.

3 And they also tried to change it. They worked together
4 to do that. And that shows the concerted action and
5 conspiracy.

6 And the -- to -- and so, you know, they're -- and they
7 were in this conspiracy and concerted action to continue to
8 violate the Controlled Substances Act and their duties to
9 not cause nuisances in Cabell County.

10 THE COURT: Well, how much time is it going to
11 take to do it? I mean, this looks to me like this is going
12 to be a rabbit trail that -- like Mr. Hester said, that's
13 going to waste a whole lot of time.

14 MR. MAJESTRO: We don't think so, Your Honor, and
15 Your Honor is quite adept at cutting us off when we get --
16 when we get more than enough evidence on a subject. We're
17 happy to let you be the judge when you've heard enough on
18 it.

19 THE COURT: Well, and like you said, you'll be
20 using your trial time.

21 MR. MAJESTRO: Right.

22 THE COURT: I'm not going to let this trial go
23 beyond what we've set aside.

24 So, Ms. Hardin, do you want another bite at the apple
25 here?

1 MS. HARDIN: Well, I just wanted to make clear,
2 Your Honor, that what they have to show is concerted action
3 for an unlawful purpose and showing that we lobbied the
4 government, that we wanted to change the law, even if that's
5 what the evidence were to show, that we didn't like the
6 current law and tried to change it, there is nothing
7 unlawful. That is exactly what is protected by the First
8 Amendment under the *Noerr-Pennington Doctrine*.

9 So, based on what you just heard from Mr. Majestro,
10 they cannot and don't even seem to have a plan to show that
11 this was for any unlawful purpose. And so, therefore, this
12 evidence shouldn't be admitted because it can't be the basis
13 of any liability, substantive or concerted action, and I
14 won't repeat all the arguments. And it seems like Your
15 Honor sees --

16 THE COURT: I'm not --

17 MS. HARDIN: -- that it's going to be a rabbit
18 hole. I'm sorry. You --

19 THE COURT: I'm sorry.

20 I'm not sure this is an unlawful purpose, Mr. Majestro.

21 MR. MAJESTRO: The unlawful purpose is, is
22 violating the Controlled Substances Act and continuing to
23 distribute opioids.

24 And, you know, and the last thing I'll say about intent
25 is that intent is an issue the defendants raised. They're

1 the ones that said we have to prove intent. That's their
2 motion.

3 MR. HESTER: Well, I think -- I think what Mr.
4 Majestro just said proves up our point, Your Honor.
5 Violating the law through petitioning activity is
6 *Noerr-Pennington* protected. So, if there's some suggestion
7 that the petitioning activity was somehow improper, that's
8 -- that is protected activity.

9 They also don't have any evidence that it was improper.
10 It was conventional activity to seek adjustments in the
11 regulatory scheme, changes in legislation, filing of amicus
12 briefs.

13 That's conventional activity, First Amendment
14 protected. The suggestion that somehow that can be held up
15 as a violation of law proves the point this is a
16 *Noerr-Pennington* protected activity and we are going to have
17 a real detour. And it's not merely in the plaintiffs' case.
18 It also requires the defense to respond to it, Your Honor.

19 So, we think, unlike some of the other issues that may
20 be around the edge, this is one that seems clearly too far
21 afield to devote valuable trial time to.

22 THE COURT: How does it relate to intent to flood
23 the market?

24 MR. MAJESTRO: So, the -- their argument is we
25 didn't know what we were doing is wrong. You heard a

1 witness testifying about the DEA approved this and all of
2 that testimony. That's their defense in this case, that --
3 that they were acting in a manner consistent with the law.

4 And so, what this shows is a recognition that their
5 conduct was not consistent with the law. All of these
6 documents show that recognition which -- and that, combined
7 with a continued conduct in violating the law, shows that
8 they intentionally did it.

9 THE COURT: I think I have to permit this rather
10 than -- hopefully, it won't go too far.

11 MR. MAJESTRO: We understand that you don't want
12 to hear a lot of it. We'll act accordingly.

13 THE COURT: Comes out of your hide on the time,
14 Mr. Majestro.

15 MR. MAJESTRO: I'm -- we are -- we are acutely
16 aware of the clock ticking. Thank you, Your Honor.

17 THE COURT: All right.

18 MR. ACKERMAN: Your Honor, David Ackerman. One
19 additional issue after I try to navigate my way through the
20 wires here.

21 Your Honor has heard a lot in the last couple of days
22 about the parties' exhibit stipulation. And that
23 stipulation has a number of components. And one of the
24 components certainly is that the plaintiffs need to provide
25 notice to defendants of the documents that we intend to use

1 with a witness we call by 7:00 p.m.

2 The complimentary component to that is that defendants
3 are required to disclose non-authenticity objections to all
4 exhibits that we have disclosed by 10:00 p.m. on the evening
5 prior to the anticipated use at trial.

6 And I raise this, Your Honor, because we have disclosed
7 in the last two nights documents for Mr. Zimmerman and for
8 the witness who will be called next, Mr. May, and received
9 objections from ABDC, but did not receive any objections
10 from McKesson and Cardinal.

11 So, some of us over on this side were a bit confused
12 and surprised to see McKesson and Cardinal objecting to the
13 admission of documents when we had not received any
14 objections from them the evening before.

15 And I -- I point this out, Your Honor, to make clear
16 that this is a court-ordered stipulation and we are doing
17 our best to abide by it and, certainly, defendants would
18 complain if we did not serve a notice of documents and then
19 jumped up and started using documents with a witness, but
20 that same argument holds for defendants' objections.

21 We are entitled to notice of defendants' objections and
22 if defendants don't serve notice of those objections, they
23 should not be required to make them -- or should not be
24 permitted to raise them during the next day at trial.

25 THE COURT: Well, the stipulation says that they

1 will not object to presentation of the documents while
2 preserving evidentiary objections.

3 MR. ACKERMAN: This is a different stipulation I'm
4 referencing, Your Honor. It is Document 1029. I have
5 copies, if you'd like to see it.

6 THE COURT: Yes. I've got --

7 MR. ACKERMAN: All right.

8 MR. HESTER: Your Honor, I think there's a very
9 simple answer here, which is an objection for one is an
10 objection for all. ABDC filed objections.

11 MR. MAHADY: And, Your Honor, I will note that
12 when we -- sorry. Your Honor, I will note that when we
13 served our objections, at least in the e-mail last night, we
14 said defendants, plural, reserve all objections. So --

15 MR. ACKERMAN: But, Your Honor, it can't be the
16 case that ABDC serves objections for itself because the
17 e-mails that we've received the last two evenings both say,
18 "Attached, please find ABDC's objections to the list of
19 exhibits." It can't be the case that then every defendant
20 is entitled to make any other objection simply because there
21 is a line afterwards that say defendants reserve the right
22 to raise an objection. That renders the stipulation
23 meaningless.

24 The reference -- the provision I was referencing in the
25 stipulation, Your Honor, is on Page 7. There's a box that

1 says "Procedure for exhibit objections."

2 MR. MAHADY: Your Honor, this is somewhat ironic.
3 I think this would be less of an issue if we were getting
4 real disclosures and were not scrambling to respond to these
5 oversized disclosures.

6 We responded. We said we reserved the right for all
7 defendants. I think Cardinal and McKesson have the right to
8 object.

9 MR. ACKERMAN: Well, we would submit, Your Honor,
10 that the right of Cardinal and McKesson to object is
11 contingent upon their following the procedures set forth in
12 the exhibit stipulation.

13 THE COURT: Well, and how are they not following
14 the procedure?

15 MR. ACKERMAN: Well, Your Honor, if you look at
16 Page 7, it says, "Procedure for non-authenticity exhibit
17 objections", and there is a 10:00 p.m. deadline for
18 disclosure of non-authenticity objections to all exhibits
19 and we did not receive any disclosure from Cardinal or
20 McKesson.

21 THE COURT: Well, they haven't objected to the
22 authenticity of any of these, have they?

23 MR. ACKERMAN: Well, yes, Your Honor. This
24 morning, counsel for Cardinal stood up and made relevance
25 and other -- and other types of objections.

1 THE COURT: Well, a relevance objection is not an
2 objection to authenticity, is it?

3 MR. ACKERMAN: That's right. That's why it was
4 required to be disclosed last night.

5 MR. HESTER: Well, Your Honor, we've been
6 proceeding on the understanding and assumption, as we
7 discussed with the Court at the start of the case, that if
8 one of the defendants lodges an objection, that would
9 suffice as an objection on behalf of all three. I don't
10 understand the difference whether three or one of the
11 defendants objects.

12 The plaintiffs are on notice of the objection and that
13 was the basis on which we've been proceeding. Rather than
14 all three defendants spending time at night filing the same
15 objections, one defendant files the objections, and that
16 covers all three of us.

17 MR. ACKERMAN: There were also, Your Honor, at
18 least one document, and I think more, where defendants did
19 not disclose any objections -- or disclose any objections
20 and then raised them today in court. So, that is a separate
21 and subsidiary issue. We just want to make clear that we
22 understand what the rules are going forward.

23 THE COURT: Well, the stipulation says
24 non-authenticity objections.

25 MR. ACKERMAN: Yes, Your Honor. The stipulation

1 says non-authenticity, and that is our concern, is that
2 there were documents -- again, it is a -- it is a two-part
3 concern is, number one, that defendant -- there were
4 defendants here who did not serve objections who then
5 objected. There were also documents and at least one that
6 Mr. Farrell pointed out where defendants did not raise any
7 objections last night, but then raised objections this
8 morning.

9 THE COURT: But it has to be an objection to
10 authenticity, doesn't it?

11 MR. ACKERMAN: No.

12 THE COURT: For the stipulations?

13 MR. ACKERMAN: They have to disclose
14 non-authenticity objections.

15 THE COURT: Okay. And you're saying there were
16 documents that came in this morning and they didn't do that?

17 MR. ACKERMAN: There was at least one that I
18 recall, yes, and we just want to make sure. We're raising
19 it now because we want to make sure we understand the rules
20 of the road going forward, that if don't get a
21 non-authenticity objection the night before, we can assume
22 that we're not going to hear a relevance or some other type
23 of objection the next day in court. This is the other side
24 of the coin of the same issue that defendants have
25 complained about.

1 THE COURT: Ms. Wicht wants to say something.

2 MS. WICHT: Thank you, Your Honor. Jennifer Wicht
3 for Cardinal Health. I would just point out, in addition to
4 the fact that an objection for one is an objection for all,
5 of course, there are objections, as we saw this morning,
6 that arise only in the context of the particular testimony
7 that simply can't be known the night before.

8 We don't know how the documents will be used with a
9 particular witness. The cumulative objection that arose
10 this morning, of course, is not something that can be
11 anticipated. So, I think the idea that we would somehow
12 eliminate any sort of new objections in the courtroom, it's
13 just simply not possible.

14 MR. ACKERMAN: It's not the cumulative objection,
15 Your Honor.

16 THE COURT: Well, Mr. Nicholas?

17 MR. NICHOLAS: I was going to say that and I would
18 only add that if, after all of this -- after all that's
19 happened so far, the plaintiffs have the example of one
20 document that may have slipped through that wasn't objected
21 to, that is not a very big sample size. I don't think it
22 really justifies this speechifying and this level of
23 attention.

24 THE COURT: Well, let's press on and you can raise
25 this with -- in the specific context if you think it comes

1 up.

2 MR. ACKERMAN: Understood, Your Honor.

3 THE COURT: We're wasting a lot of time here.

4 Mr. Farrell?

5 MR. FARRELL: Ready to proceed, Judge.

6 THE COURT: Are you ready for the witness?

7 MR. FARRELL: Yes, Your Honor.

8 THE COURT: Mr. Zimmerman, where are you?

9 MR. FARRELL: If all goes well, Judge, I have four
10 documents.

11 THE COURT: All right.

12 BY MR. FARRELL:

13 **Q.** Welcome back, Mr. Zimmerman.

14 **A.** Good afternoon.

15 **Q.** I'm going to bring up and show you document P-8231, the
16 amicus brief submitted on behalf of HDMA in the *Cardinal*
17 *Health versus Eric Holder* matter.

18 Can you bring it down, please, until --

19 May I approach?

20 BY MR. FARRELL:

21 **Q.** Mr. Zimmerman, I only have a couple of reference points
22 to this document, but before we get into it -- I'm sorry. I
23 will give you a chance to review it.

24 **A.** Did you want me to read it first or do you want to ask
25 me?

1 Q. Have you --

2 MR. NICHOLAS: Your Honor, I don't want to
3 interrupt the examination. This is a legal brief. This is
4 an amicus brief. It's a document that we would -- that, you
5 know, it goes to the *Noerr-Pennington* issue. I want to at
6 least preserve the objection by making it here before we go
7 forward.

8 THE COURT: All right. The objection is shown on
9 the record and you go ahead.

10 MR. FARRELL: Thank you.

11 BY MR. FARRELL:

12 Q. Mr. Zimmerman, have you seen this document before?

13 A. I don't specifically recall. I mean, I've heard about
14 it, but I can't remember -- I don't know if I've ever
15 actually read it.

16 MR. FARRELL: I'm going to -- I'm not going to
17 admit it into the record yet, Judge, but I would like to
18 publish P-2948.

19 MR. FARRELL:

20 Q. We'll have to show it up on the screen and see if that
21 refreshes your recollection.

22 MS. MAINIGI: Your Honor, the witness has said
23 that he doesn't even know if he's read it, so I don't
24 understand what the basis would be for putting it up on the
25 screen. There's no foundation.

1 THE COURT: Well, I agree, at this point, Mr.
2 Farrell.

3 MR. FARRELL: Okay. May I try another way?

4 THE COURT: Yes, you may.

5 MR. FARRELL: Judge, we'll be circulating to
6 counsel and to Your Honor P-2948.

7 May I approach?

8 THE COURT: Yes.

9 THE WITNESS: Thank you.

10 BY MR. FARRELL:

11 Q. Sir, do you recognize P-2948?

12 A. I do.

13 Q. And what is it?

14 A. It's an e-mail string.

15 Q. And what's the subject matter?

16 A. Draft amicus brief.

17 Q. What's the rest of the --

18 A. *Cardinal Health v. Holder*.

19 Q. What is the date?

20 A. It is February 23rd, 2012.

21 Q. And who is it from?

22 A. The first one?

23 Q. Yes, the top.

24 A. Oh, the very top is from Steve Mays to me.

25 Q. Okay. And what is the -- what does the comment from

1 Steve Mays say?

2 **A.** "I agree with your comments, but don't believe that
3 HDMA is being too aggressive."

4 **Q.** Now go to the e-mail below that. Who is that e-mail
5 from?

6 **A.** It's from me to Steve.

7 **Q.** And what does it say?

8 **A.** "Please read and then we can discuss."

9 **Q.** Okay. So now, flip to Page 2. Do you recognize the
10 names on these?

11 **A.** I do.

12 **Q.** Does it include the CEO of AmerisourceBergen?

13 **A.** He's copied, yes.

14 **Q.** Does it include the President of AmerisourceBergen?

15 **A.** He is copied, yes.

16 **Q.** Now, if you will turn to Page 3, and you'll see that
17 it's a bleed-over e-mail, but it's the e-mail that is from
18 John Gray and, at the top of Page 3, it says, "Gentlemen".
19 Do you see that?

20 **A.** Yes.

21 **Q.** Okay. And will you read that into the record, please?

22 **A.** "Attached is a draft amicus brief that HDMA could file
23 on behalf of our membership in support of the Cardinal case
24 next week."

25 **Q.** This is an e-mail that you received in the course of

1 your job as the Senior Vice President of CSRA at
2 AmerisourceBergen, correct?

3 **A.** Yes. I received this.

4 MR. FARRELL: Judge, I'd ask for P-2948 to be
5 entered into the record.

6 THE WITNESS: I forwarded it on to Steve to read.
7 Again, I'm not sure if I read the entire brief, but --

8 THE COURT: Mr. Hester?

9 MR. HESTER: I would object, Your Honor, on
10 *Noerr-Pennington* grounds. This is -- this is substantive
11 evidence of petitioning activity. I don't think it's
12 properly admitted. But I understand the Court's rule, but I
13 wanted to preserve our objection.

14 THE COURT: All right.

15 MS. MAINIGI: Your Honor, all I would add is this
16 does not show intent to do anything unlawful, which is what
17 they need to show.

18 THE COURT: Well, the objections for now are
19 overruled. Go ahead, Mr. Farrell. Let's get through this.

20 MR. FARRELL: So, is the document submitted for
21 the Court as admitted, Judge?

22 THE COURT: Subject to the objections of all three
23 defendants, it's admitted.

24 **PLAINTIFF EXHIBIT P-2948 ADMITTED**

25 MR. FARRELL: I'd next like to bring up P-214.

1 May I approach, Judge?

2 THE COURT: Yes, you may.

3 BY MR. FARRELL:

4 Q. Mr. Zimmerman, do you recognize this document?

5 A. An e-mail from me to Dave Neu.

6 Q. Who was Dave Neu?

7 A. He was, I believe, at this time, the president of the
8 drug company.

9 Q. And what's the date?

10 A. February 24th, 2012.

11 Q. And you will see this is an e-mail that you wrote in
12 the normal course of business as the Senior Vice President
13 of CSRA?

14 A. Vice President at the time, but yes.

15 Q. And, again, this is an acknowledgment by you that you
16 were making comments upon the *Cardinal Health/Holder* amicus
17 brief, correct?

18 A. Let me read for a second. It appears to be.

19 MR. FARRELL: Judge, I would ask for P-214 to be
20 entered into the record.

21 MR. HESTER: We would preserve our objection on
22 *Noerr-Pennington* grounds, Your Honor.

23 MS. MAINIGI: Same, Your Honor.

24 THE COURT: All right. It's admitted over the
25 objections of the defendant.

PLAINTIFF EXHIBIT P-214 ADMITTED

BY MR. FARRELL:

Q. Next is P-9156.

MR. FARRELL: Judge, may I approach?

BY MR. FARRELL:

Q. Mr. Zimmerman, do you recognize this document?

A. The first e-mail is from me.

Q. Who is it to?

A. It's to my team, some members of my team, and some legal.

Q. Would you identify them, please?

A. Steve Mays, Ed Hazewski, Bruce Gundy, Paul Ross, Mary Fox and John Chou.

Q. And what is the message that you sent?

A. "FYI", for your information.

Q. What's the date of it?

A. March 5th, 2012.

Q. What does "FYI" stand for?

A. For your information.

Q. What is it that you're sending them for their information?

A. It looks like the amicus brief.

Q. And do you see -- do you see on the attachments what it says, top of Page 1?

A. Yeah. "HDMA amicus brief, *Cardinal v. Holder*,

1 March 4th" -- "March" -- yeah -- "4th, 2012".

2 **Q.** Does this document actually contain an attachment of
3 the amicus brief?

4 **A.** That's what it appears to be.

5 MR. FARRELL: Judge, I would ask for P-9156 to be
6 admitted into the record.

7 MR. HESTER: Your Honor, we object on
8 *Noerr-Pennington* grounds. In addition, there's hearsay in
9 this, in this document at the bottom of the page that we
10 object to.

11 MS. MAINIGI: Join, Your Honor.

12 MR. NICHOLAS: Join that objection, Your Honor.

13 THE COURT: All right. Go ahead.

14 BY MR. FARRELL:

15 **Q.** So, let's circle back. Do you now have a recollection
16 that you had access to, reviewed and commented on the amicus
17 brief submitted on behalf of HDMA in a matter of *Cardinal*
18 *Health v. Holder*?

19 **A.** It appears that I reviewed, looked at it, yes.

20 **Q.** Now, circling back to P-8231, the actual amicus brief
21 --

22 MR. FARRELL: Did I pass out copies already?

23 MR. HESTER: Yes, she did.

24 BY MR. FARRELL:

25 **Q.** You have the amicus brief in front of you, do you not,

1 sir?

2 **A.** Yes.

3 **Q.** And I'd like you to flip to Page -- Page 2 of the
4 brief. It's Bate stamped Page 11 at the bottom.

5 **A.** Okay.

6 **Q.** And we can bring it up on the monitor now. And I'm
7 looking at the paragraph -- the second full paragraph that
8 starts, "HDMA's members". Would you read aloud, please?

9 **A.** "HDMA's members have not only statutory and regulatory
10 responsibilities to detect and prevent diversion of
11 controlled prescription drugs, but undertake such efforts as
12 responsible members of society. The public" --

13 **Q.** Do you agree with that statement?

14 **A.** Yes.

15 **Q.** And the next sentence, would you read it aloud, please?

16 **A.** "The public health dangers associated with the
17 diversion and abuse of controlled prescription drugs have
18 been well-recognized over the years by Congress, DEA, HDMA
19 its members, and public health authorities."

20 **Q.** Do you agree with that statement, sir?

21 **A.** Yes.

22 **Q.** If you turn the page to Page 3, starting with "HDMA" at
23 the very top of the page.

24 **A.** Okay.

25 **Q.** This is where HDMA is providing context for the Court.

1 Would you read that into the record, please?

2 **A.** "HDMA respectfully provides the context in which DEA
3 has taken enforcement actions against distributors while the
4 agency has failed to provide meaningful guidance to assist
5 the regulated industry in complying with DEA's
6 interpretation of its implementing regulations."

7 **Q.** And the next sentence, please?

8 **A.** "HDMA respectfully submits that despite the agency's
9 oft-recited refrain that the regulations are clear, the
10 regulated industry doesn't know the rules of the road
11 because they haven't been adequately explained."

12 MR. NICHOLAS: Your Honor, I'm going to object at
13 this point. He's reading a brief and that's all he's doing.

14 THE COURT: Yeah. And what -- what's the
15 significance of that to this case? I mean, that doesn't
16 show me anything.

17 MR. FARRELL: Judge, what I'm attempting to --

18 THE COURT: Other than what happened and they --
19 okay, go ahead.

20 MR. FARRELL: What I'm attempting to demonstrate
21 is that the DEA provided notice and warning to all three
22 defendants that they were not following the law and, as a
23 foreseeable risk, it was causing diversion of pills.

24 THE COURT: Well, and they're saying they were
25 trying to get the regulations changed because they're not

1 clear.

2 MR. FARRELL: And so, what we have is we have
3 repeated settlement agreements between the defendants and
4 the federal government. We have their own policies and
5 procedures where they're following what the DEA tells them
6 to do. And then they show up in federal court and they file
7 a brief and, on Page 4, continue to take the position which
8 is the absolute opposite of what they promised to do to
9 perform with the DEA. That's the point.

10 THE COURT: Well, if they're trying to get the
11 rules changed, what's wrong with that?

12 MR. FARRELL: Well, if they're trying to get the
13 rules changed, then that's an acknowledgment that the rule,
14 they haven't been following.

15 MR. NICHOLAS: That doesn't follow.

16 THE COURT: No. I don't think it follows at all.

17 MR. FARRELL: Well, maybe I've not used the right
18 combination of words to explain. What we're trying to
19 establish is that the rules are, say, A, and that the
20 defendants say the rules say B. Following their attempt
21 with this disagreement, they lost that argument with the --

22 THE COURT: Yes, but that doesn't mean that they
23 weren't following the rules to begin with, if they wanted to
24 get them changed.

25 MR. FARRELL: I'm not suggesting that they're

1 trying to change the -- this isn't going to Senate Bill 483
2 or that Marino Bill. This isn't going to when the law
3 changed later on down the road. What this is, is state of
4 mind in 2012 that, despite repeated warnings,
5 AmerisourceBergen was stubbornly sticking to their
6 interpretation of the statute having been warned by the DEA,
7 and having been sanctioned by the DEA, and having entered a
8 Settlement Agreement with the DEA, and having promised in
9 written correspondence to the DEA that they would perform
10 these functions.

11 MR. NICHOLAS: Well, I strongly, strongly disagree
12 with everything he said. The record doesn't support that.
13 That is not what we've seen. It's not the truth. And I --
14 I do not think we should pursue this line of questioning.

15 THE COURT: I'm going to sustain the objection and
16 cut you off on this. This is not going anywhere relevant to
17 the case that I can see.

18 I don't see anything wrong with a party trying to get
19 the rules changed if they -- if they do so in the proper
20 format and within the proper method and everything and I
21 don't think it -- well, I've said enough. Go ahead.

22 MR. FARRELL: Judge, let me create a record of why
23 we're doing this. I'm not suggesting there's anything wrong
24 with them taking the position that they're taking in the
25 amicus brief.

1 I'm not suggesting that there's any liability because
2 they took a position where they disagree with the DEA.

3 What I'm suggesting is that these documents show, over
4 a period of 14 years, a consistent stubbornness to perform
5 the duties that the DEA believes they have.

6 THE COURT: But that's not what -- the documents
7 don't say they stubbornly refused to perform the duties the
8 DEA put on them.

9 MR. FARRELL: Well, I wasn't able to get to that
10 page of the document. I was trying to lay the foundation.

11 THE COURT: Well, I -- the objection is sustained.
12 I think we've beaten this horse enough. Go ahead.

13 MR. FARRELL: Two more documents, Judge.

14 BY MR. FARRELL:

15 **Q.** Mr. Zimmerman, do you recall in 2013 participating in
16 the HDMA's Drug Diversion DEA Strategy Task Force?

17 **A.** I may. I may have.

18 MR. FARRELL: I'm going to circulate what is
19 P-9486.

20 May I approach, Judge?

21 THE COURT: Yes.

22 THE WITNESS: Thank you.

23 BY MR. FARRELL:

24 **Q.** Do you recognize this document, sir?

25 **A.** It appears to be a cover memo, agenda, and it looks

1 like a series of presentations probably from a meeting, it
2 appears to be.

3 **Q.** Who is it from?

4 **A.** It's from Pat, Patrick Kelly, from HDMA.

5 **Q.** Who is it to?

6 **A.** It's to several members. Elizabeth Campbell, Gary
7 Cacciatore, Kim Couch, Gilberto Quintero, T. Readling, Tom
8 Twitty, Don Walker, myself, John Gray, Ann Bittman, Pat
9 Kelly, Elizabeth Gallenagh, Perry Fri, Kristen Freitas,
10 Anita Ducca, John Parker, George Koch. I think it's Peter
11 Vanderveer and Anne Johnson.

12 **Q.** What's the date?

13 **A.** It is dated Thursday, December 5th, 2013.

14 **Q.** Would you read the first sentence after "Dear HDMA Drug
15 Diversion DEA Strategy Task Force Members"?

16 **A.** "On behalf of John Gray and the HDMA Executive
17 Committee, thank you for agreeing to participate on the HDMA
18 Drug Diversion DEA Strategy Task Force. We look" -- you
19 know, how long do you want me to read?

20 **Q.** That's good. And are there documents attached to this
21 e-mail?

22 **A.** Yes.

23 **Q.** Do you recognize the documents attached to the e-mail?

24 **A.** If I was there, I would have seen them, but I don't,
25 you know, recognize them looking at them.

1 Q. Before we go further on this document, we're going to
2 talk about P-9160.

3 MR. FARRELL: May I approach, Judge?

4 THE COURT: Yes.

5 THE WITNESS: Thank you.

6 BY MR. FARRELL:

7 Q. I'll give you a minute to review this document.

8 Sir, do you recognize this document?

9 A. The first document, the top of it is an e-mail from me
10 to John Chou.

11 Q. And who is John Chou?

12 A. He is my boss, General Counsel.

13 Q. What is the date of the document?

14 A. Date of document is Friday, November 1st, 2013.

15 Q. And are there attachments to this document?

16 A. There is. There is.

17 Q. And are these similar to the documents that you
18 received from -- or you received by e-mail from Patrick
19 Kelly?

20 A. From the -- the other one?

21 Q. Yes, sir.

22 A. The first couple are the same. Maybe they're a
23 different order or something. I would have to pull it apart
24 and see if they're -- they're not lined up.

25 Q. You would agree with me that these are two e-mails to

1 and/or from you which include materials that you received as
2 a member of the HDMA Drug Diversion DEA Strategy Task Force?

3 **A.** Yes.

4 **Q.** And I'm going to have you look at P-9160 and I'm going
5 to have you flip to Bates stamp ABDC MDL 5787753. So, it's
6 a little more than 80% through to the back, and the title of
7 this particular slide that's attached to your e-mail says
8 "Industry Messages". Do you see that, sir?

9 **A.** 7753?

10 **Q.** I think the slide -- the slide number itself is Slide
11 9.

12 **A.** Yes.

13 **Q.** Do you see that documents?

14 **A.** I believe it's the same one, yes.

15 **Q.** Can we bring it up on the screen, please?

16 Sir, do you recognize this document?

17 Judge, may I approach the screen?

18 THE COURT: Yes.

19 THE WITNESS: I don't recall seeing it but, I
20 mean, I've received it, so I'm sure I saw it before.

21 **Q.** Do you recall any focus groups performed by HDMA
22 related to your role on the HDMA Task Force?

23 **A.** We met and discussed but, I mean, I can't recall
24 specific conversations.

25 **Q.** In particular, "One of the overall assessments in the

1 focus groups is that without access to data, respondents in
2 the focus group question how distributors can be held
3 responsible." Did I read that accurately?

4 **A.** Overall assessment? Yes.

5 **Q.** All right. Do you recall that being one of the
6 conclusions --

7 THE COURT: Just a minute.

8 Ms. Mainigi?

9 MS. MAINIGI: Your Honor, I object on the basis of
10 foundation. The witness does not seem to be recalling this.
11 So, Mr. Farrell is essentially testifying.

12 I also renew objections based on *Noerr-Pennington*. I
13 mean, nothing here shows any intent on anyone's part to do
14 something unlawful. So, we're going down another line of
15 questioning that seems like a rabbit hole.

16 THE COURT: Well, I'll ask you the same question I
17 did before. How is this relevant to the big issue in this
18 case that they flooded the Huntington-Cabell area with
19 drugs?

20 MR. FARRELL: Without conceding the point, what
21 I'm attempting to show is that when the flood waters
22 receded, rather than do anything else, the defendants,
23 through their trade group, began conducting focus groups to
24 try to contain the message. And one of the messages is that
25 if they could prevent the data from being exposed, then they

1 might not be held liable, which is ultimately conduct that
2 happens that we're trying to use to establish a state of
3 mind as to their past behavior.

4 So, the point of this is, is that we have two
5 particular Task Forces that Mr. Zimmerman participated in,
6 one in 2013 related to overall strategy that contains a
7 Crisis Play Book that we mentioned earlier and the results
8 of their focus groups that framed their positions.

9 And as I said in opening argument, Judge, many of the
10 arguments being made by counsel and by the defendants today
11 are born out of the results of these focus groups. That's
12 point one.

13 Point number two is the second group Mr. Zimmerman
14 participated in was a West Virginia Task Force formed by
15 HDMA entitled "Turning the Tide in West Virginia" in 2015.
16 Not turning the tide of the opioid epidemic, but as -- if
17 permitted, I'll lay the foundation for turning the tide on
18 the media's portrayal of their role in the opioid epidemic.

19 So, we're attempting to show that when given the
20 opportunity to do something, what the defendants did was run
21 from liability. And we believe -- I'm not trying to make
22 the -- I'm giving you the color because this is the basis
23 for that color.

24 MR. NICHOLAS: Your Honor, I don't think that was
25 in response to a pretty simple question. I think that was a

1 grandstanding speech which has no place in the courtroom and
2 has no place on the public record, frankly. I know that
3 media is listening to this thing in an overflow room and
4 perhaps that's why we're hearing such speeches, but there is
5 no basis for this in the record.

6 He is not -- he would not be able to prove it. There's
7 no foundation for any of this. I don't believe that -- I
8 disagree strongly with everything he said, every
9 characterization he's made.

10 This is exactly why we -- this is one of the reasons we
11 objected to this material in the first place and I wouldn't
12 want the record to be -- to be lacking for the fact that I
13 strongly -- that, on behalf of my client, I totally disagree
14 with the speech, the closing argument, the
15 mischaracterizations, and the fact that none of that stuff
16 is going to prove out in this case. I have to say it.

17 THE COURT: Ms. Mainigi?

18 MS. MAINIGI: I think Mr. Farrell with his speech
19 proves the point that we've been trying to make, Your Honor,
20 and denying liability is not intent. He should not be
21 allowed to continue this.

22 THE COURT: Mr. Hester?

23 MR. HESTER: Your Honor, just to amplify on this
24 slightly, I think what Mr. Farrell has said really
25 illustrates why the plaintiffs are, in fact, trying to

1 discern or impose liability based on petitioning conduct.

2 These are -- HDMA is a Trade Association. It's engaged
3 in evaluating legislative strategies, regulatory strategies
4 and media strategies. The fact that they're engaged in a
5 media strategy along the lines of what's on the board is
6 petitioning activity.

7 It's protected First Amendment activity. And to draw
8 from that some sinister inference is entirely unfair. It's
9 entirely at odds with First Amendment principles. They're
10 not using this in any legitimate way.

11 They're trying to find a basis for liability based on
12 the activities of a Trade Association that was engaged in
13 very conventional activity. And I think Mr. Farrell's
14 argument really illustrates that, that he is trying to draw
15 from decisions that were being made in petitioning activity,
16 whether they were going to pursue a press strategy, or a
17 regulatory strategy, he's trying to discern from that some
18 sinister intent that then they try to imply here. Well,
19 that's trying to impose liability based on First Amendment
20 activity.

21 THE COURT: Well, even if the *Noerr-Pennington*
22 *Doctrine* doesn't keep this out, Mr. Farrell, what's the
23 relevancy?

24 MR. FARRELL: State of mind. Notice.

25 THE COURT: How -- how does this show a state of

1 mind that is probative of liability in this case?

2 MR. FARRELL: Well, part of their defense is to
3 blame the DEA and, if permitted, I would be able to show a
4 slide that shows the origins of that defense.

5 THE COURT: Well, why don't you do that? Other
6 than that, I just -- I don't see that this is helpful at
7 all, but I'll let you go ahead a little bit.

8 MR. FARRELL: Judge, will you give me a moment to
9 confer?

10 THE COURT: Yes.

11 (Pause)

12 MR. FARRELL: Judge, we withdraw both amicus
13 briefs, documents supporting it, as well as the HDMA
14 documents.

15 No further questions.

16 THE COURT: You have no more questions of this
17 witness; is that right?

18 MR. FARRELL: That's correct.

19 THE COURT: And withdrawing the exhibits?

20 MR. FARRELL: Yes, sir.

21 THE COURT: All right. You may cross examine, Mr.
22 Nicholas.

23 **CROSS EXAMINATION**

24 **BY MR. NICHOLAS:**

25 **Q.** Good afternoon, Mr. Zimmerman.

1 **A.** Good afternoon, Mr. Nicholas.

2 **Q.** Mr. Zimmerman, how long have you been employed at
3 AmerisourceBergen?

4 **A.** I've been employed for 31 years.

5 **Q.** And what is your current position?

6 **A.** My current position is Senior Vice President of
7 Corporate Security and Regulatory Affairs.

8 **Q.** That's CSRA?

9 **A.** That's correct, CSRA.

10 **Q.** Have you always -- for all the 30 years you've been
11 with the company, have you always worked in the area of
12 security and regulatory affairs at the company?

13 **A.** My duties have always been with security and
14 regulatory. At the very beginning, it was referred to as
15 Corporate Security, but always with security and regulatory.

16 **Q.** Have you ever been on the business side or the sales
17 side of the company?

18 **A.** No.

19 **Q.** In your current positioning, have you had any
20 responsibilities in connection with the pandemic?

21 **A.** Yeah. I'm also one of the four-member COVID Task Force
22 that we assembled. I guess it's been, unfortunately, a year
23 and a half and we made -- started the decisions of how to
24 conduct business making sure we continue product flow to
25 hospitals and pharmacies. And in the pandemic, our

1 warehouses are frontline workers, essential workers, and are
2 critical to the supply channel.

3 **Q.** I'm going to go straight to asking you some questions
4 about AmerisourceBergen generally, if I may. First of all,
5 what is AmerisourceBergen Drug Company?

6 **A.** AmerisourceBergen Drug Company is a drug wholesaler.

7 **Q.** And what does a wholesale pharmaceutical distributor or
8 a drug wholesaler do?

9 **A.** Our part in the supply chain is we buy pharmaceuticals,
10 over-the-counter products. Pharmaceuticals include
11 controlled substances, health and beauty aids, and we buy
12 from about 2,000 different manufacturers and we bring them
13 into our warehouses and make them available for pharmacies
14 and hospitals.

15 **Q.** Where is your company headquartered?

16 **A.** We're headquartered in -- well, next month, when we
17 open our new building, it'll be -- well, when the pandemic
18 lifts, we'll be in Conshohocken, Pennsylvania.

19 **Q.** How many employees does AmerisourceBergen employ?

20 **A.** Close to 23,000.

21 **Q.** And how many distribution centers do you have?

22 **A.** We have approximately 27.

23 **Q.** What products does AmerisourceBergen distribute?

24 **A.** So, we distribute controlled substances,
25 pharmaceuticals, over-the-counter drugs, health and beauty

1 aids, anything you would find in a -- from a regular
2 pharmacy to what hospitals would need.

3 **Q.** Yesterday you were asked how much of a market share
4 does The Big Three hold nationally and you said, "I've heard
5 upwards of 90%." What products were you referring to when
6 you answered that question?

7 **A.** I was -- I was -- the 90% was applied to the full
8 complement of products, the health and beauty aids, OTC,
9 pharmaceuticals and controlled substances. The 90%
10 contained all that.

11 **Q.** So, you weren't referring to opioids?

12 **A.** No. Not -- not opioids. I've read articles where it's
13 much less, our market share.

14 **Q.** And just to be clear, does AmerisourceBergen
15 manufacture opioids?

16 **A.** We do not.

17 MR. NICHOLAS: Okay. Richie, could we just show
18 the supply chain as a demonstrative, please?

19 BY MR. NICHOLAS:

20 **Q.** I just want to ask you a few questions about the
21 healthcare supply chain in the United States and we can use
22 this for reference as needed. What is AmerisourceBergen's
23 role in the healthcare supply chain in the United States?
24 What does the company do?

25 **A.** So, as I briefly explained -- a little bit more detail.

1 So, we have -- there's 2,000 manufacturers that fluctuates
2 that we buy products from where we purchase -- we carry
3 anywhere from 60,000 different items within our warehouses
4 and there's over -- we have over 16,000 pharmacy customers.

5 So, what we do, without a distributor, each one of
6 those 2,000 manufacturers have to ship direct to the
7 pharmacy. And those pharmacies would have to place 2,000
8 separate orders. They'd have to receive 2,000 separate
9 receipts at the door each day. And that's the product going
10 out.

11 There's also the setup of the customers. The
12 manufacturers only have to set up a few distributors and
13 sell their products to the distributors. And then, we
14 handle all the pharmacies, making sure that they have an
15 appropriate license and collect.

16 **Q.** So, just to make the point clear, why is it that
17 pharmacies and manufacturers don't just deal directly with
18 each other? Why not cut out the middleman?

19 **A.** It would be too many -- it would be -- one, it would be
20 too many transactions and the manufacturers couldn't handle
21 it because they ship like once a week, where we ship every
22 single day, and the pharmacies need those products the
23 following day.

24 And they may need from -- you know, half -- if they
25 ordered 50 products, it could be 50 different suppliers

1 they're buying from. So, they could get it in one order.
2 And the timing of it, our customers can order up until 6:00
3 at night and then get the orders the very next day. And we
4 want to do that daily to keep their inventory levels low.

5 **Q.** Now, everyone in the supply chain, with the exception
6 of the patient, is licensed and is regulated, correct?

7 **A.** Yes. So, I may have explained yesterday. So, each
8 segment on the -- in the supply chain as DEA refers to as
9 the Closed System must be -- hold a registration by the DEA
10 in order to handle controlled substances and each set of
11 responsibilities, whether your -- your registration is
12 classified as a manufacturer has specific requirements they
13 must follow.

14 There's a distributor classification. There's a
15 practitioner classification. And retail pharmacy
16 classification. Each one has a specific set of guidelines.

17 But there's also general guidelines for having
18 effective controls to prevent diversion that we all must
19 follow when the products are in our possession.

20 **Q.** And AmerisourceBergen is licensed by the DEA with
21 regard to controlled substances; is that correct?

22 **A.** That's correct.

23 **Q.** All right. Is AmerisourceBergen also licensed by
24 individual Boards of Pharmacies, State Boards?

25 **A.** Yes. So, we refer to them as state regulatory

1 authorities. Some are Boards of Health. Some are Boards of
2 Pharmacy. There's sometimes another third, which is State
3 Controlled Substance Authority within the state.

4 **Q.** Does that include the West Virginia Board of Pharmacy?

5 **A.** It does, yes.

6 **Q.** All right. I want to ask you a few questions about
7 reporting. We've heard about ARCOS, so I'm not going to ask
8 you to explain what that is again, but so I think we all
9 know what it is, but does AmerisourceBergen report to the
10 ARCOS database?

11 **A.** Yes.

12 **Q.** All right. How often?

13 **A.** We -- AmerisourceBergen -- you have an option of
14 monthly or quarterly. AmerisourceBergen reports monthly.

15 **Q.** Does AmerisourceBergen also report controlled
16 substances -- substance transactions to the DEA daily?

17 **A.** Yes. We -- as part of our forwarding agreement, we
18 report every single sale of controlled substances, not just
19 Schedule II, but all schedules, to the DEA on a daily basis.

20 **Q.** Now, the healthcare supply chain is often referred to
21 as the Closed System of Distribution.

22 **A.** Yes.

23 **Q.** Why does that matter? What does that mean and why does
24 it matter that it's a Closed System of Distribution?

25 **A.** So, as I mentioned that each registration has a

1 certification, a classification, and then they have specific
2 responsibilities within that closed chain. And so, it
3 provides the tool for DEA to identify where diversion is
4 occurring in the supply chain.

5 So, when a manufacturer manufactures the product, they
6 have to keep records of where all that product was
7 distributed to, and then the distributor must maintain
8 records of the part they received, and then what customers
9 they shipped it to.

10 So, when the DEA comes into our facilities, which they
11 come in quite often, they'll come in. They'll do an audit.
12 They'll take -- they'll say let me see your receipts.
13 They'll subtract all of our sales. And then, they'll look
14 at the end in inventory. Any discrepancies would be
15 diversion. The product would be missing from the legitimate
16 source.

17 Pharmacies have the same requirements. So, once we
18 send out product to the pharmacy, the pharmacy has to keep a
19 record of all the property received from the distributor, or
20 distributors. And then, DEA can take that total, subtract
21 the number of prescriptions they have. If they don't have
22 that remaining amount on the shelf, then revert to
23 diversion.

24 And so, it's a complete closed circle. The closed --
25 the Closed System that illustrates that DEA at any given

1 time can track a product from manufacturing to dispensing to
2 detect diversion.

3 **Q.** So, under the system, every pill is accounted for?

4 **A.** Through -- down to prescription because with the
5 inventory -- so, when they -- I'll use distributor as an
6 example.

7 They'll take a -- they'll take all the receipts.
8 They'll subtract the sales. They'll count the shelf. Then,
9 we'll have to show them a DEA 106 Form for anything that was
10 theft -- or stolen or a 41 Form for any product loss. So,
11 every single pill should be accounted for.

12 **Q.** Okay. I'd like to ask you a few more questions about
13 AmerisourceBergen's role. Does AmerisourceBergen ever
14 interact with the patient?

15 **A.** No.

16 **Q.** Is AmerisourceBergen ever consulted by a doctor when
17 that doctor is making prescribing decisions?

18 **A.** No.

19 **Q.** Does AmerisourceBergen make medical decisions?

20 **A.** No.

21 **Q.** Who determines whether a prescription is medically
22 necessary for a patient?

23 **A.** In that closed system, the DEA is designating the
24 practitioner to ensure -- they have the responsibility to
25 ensure that a prescription is written for a medical -- a

1 legitimate medical purpose.

2 **Q.** And before filling a prescription, does the pharmacist
3 have an obligation?

4 **A.** So, also written in the Code of Federal Regulations,
5 the pharmacist has a corresponding responsibility that the
6 prescription has been written for a legitimate medical
7 purpose.

8 **Q.** So, under the regulations, it's on both the doctor and
9 the pharmacist to determine that a prescription opioid is
10 medically necessary for the patient; is that correct?

11 **A.** That's correct.

12 MR. FARRELL: Objection, Your Honor, leading.

13 THE COURT: Well, it is leading. I'll sustain the
14 objection, Mr. Nicholas.

15 BY MR. NICHOLAS:

16 **Q.** So, under the regulations, who is responsible for
17 making the determination that a prescription opioid is
18 medically necessary for the patient?

19 **A.** So, I think it's 21 CFR 130.674 regarding
20 prescriptions. Clearly designates that the prescribing
21 physician must ensure that a prescription is written for a
22 proper medical use and the corresponding responsibility lies
23 with the pharmacist to ensure that that prescription is for
24 regular -- I think -- I can't remember the exact word -- for
25 proper medical use.

1 Q. Is AmerisourceBergen --

2 THE COURT: We have an unusual situation here.
3 This is cross examination and leading questions are normally
4 permitted on cross, but he's a witness you produced, Mr.
5 Nicholas, and you're basically directing him. So, that was
6 the basis of me sustaining the objection, even though
7 technically, this is cross examination.

8 MR. NICHOLAS: I understood. And I'm mindful of
9 the peculiar situation here and I'm going to try hard not to
10 lead. If I lead a little tiny bit, maybe I can be given a
11 little latitude, but I will really try not to do that.

12 THE COURT: Okay.

13 BY MR. NICHOLAS:

14 Q. So, the decision we're talking about as to whether to
15 prescribe, is AmerisourceBergen involved in that decision at
16 all?

17 A. No.

18 Q. Is that decision as to medical necessity ever provided
19 to AmerisourceBergen?

20 A. No.

21 Q. Now, as you know, the plaintiffs in this case are
22 Huntington, the City of Huntington, and Cabell County. Was
23 AmerisourceBergen involved in the prescribing decisions made
24 to any individuals in Huntington and Cabell?

25 A. No.

1 **Q.** Was AmerisourceBergen involved in any dispensing
2 decisions made to individuals in Huntington and Cabell
3 County?

4 **A.** No.

5 **Q.** Now, when a customer, say like a pharmacy, orders
6 prescription medications, medication from AmerisourceBergen,
7 does the distributor ever see any individual prescription?

8 **A.** No.

9 MR. FARRELL: Objection, Your Honor, continuing to
10 lead.

11 MR. NICHOLAS: I don't think that's leading.

12 THE COURT: Well, I think that question is proper.
13 It is a bit leading, but overruled.

14 BY MR. NICHOLAS:

15 **Q.** Can you explain how the ordering process works?

16 **A.** As I mentioned, the pharmacies throughout the day, they
17 have a system and they go into the system and, as they --
18 the prescriptions come in and products they need, they
19 assemble an order that they send at the end of the day and
20 it includes whatever products they need for the following
21 day. There's no specific information, not how many
22 prescriptions they have. It's just a -- the order for the
23 night.

24 **Q.** How regularly do your customers place orders?

25 **A.** So, most of our customers place orders every night.

1 Some high volume get two orders a day.

2 **Q.** In terms of recordkeeping or things of that nature, do
3 you do anything extra when a customer orders opioids?

4 **A.** So, opioids has a whole -- because it's a Schedule II
5 narcotic, there's a whole other set of regulatory
6 requirements in the CFR we must adhere to and having to deal
7 with narcotic order forms, also a DEA Form 222.

8 So, a customer -- and now, that's being replaced with
9 technology called CSOS.

10 COURT REPORTER: CSOS?

11 THE WITNESS: CSOS, C-S-O-S, yeah.

12 COURT REPORTER: Thank you.

13 THE WITNESS: And so, if the customer is a CSOS
14 customer, they have to transmit that through the CSOS
15 database that runs it through DEA. So, DEA sees the order
16 before we even see it.

17 So, the Schedule II opioid order would go through DEA's
18 database before we get it to make sure that the customer's
19 licensed and has the appropriate schedule to order Schedule
20 IIs.

21 If you're not on CSOS, and the older -- the older
22 process was you filled out a three-part form. The
23 pharmacist had to fill out and handwrite the form. Send it
24 to the distributor. The distributor is not allowed to fill
25 that order until they verify the paper form with the amount

1 of product they have.

2 And then, they would pull that form apart. And then,
3 they would mail those -- one copy to the DEA every month, in
4 addition to the ARCOS reporting, in addition to the daily
5 reporting, and in addition to the -- any other reporting
6 requirements.

7 **Q.** I want to ask you a few questions about quotas. We've
8 heard already about quotas in this case. Can you tell us
9 how that works, how the quotas work, to the best of your
10 knowledge?

11 MR. FARRELL: Objection, Your Honor, foundation.

12 BY MR. NICHOLAS:

13 **Q.** Do you know anything about how quotas for controlled
14 substances are set each year?

15 **A.** The manufacturers submit an application and they're
16 approved --

17 THE COURT: Overruled. He can answer. Go ahead.

18 THE WITNESS: Oh, I'm sorry. They're set by the
19 DEA based on an application from the manufacturers for a
20 request to manufacture a certain quantity.

21 BY MR. NICHOLAS:

22 **Q.** Okay. And do you know the purpose of the quota?

23 **A.** The -- so, the basis of the quota is to ensure that
24 there's enough medication so that we don't have shortages in
25 the supply channel. So, they have to -- the manufacturers

1 have to present the amount that, based upon their
2 information in the perceived medical needs for the following
3 year, they need a certain amount of product to be
4 manufactured.

5 And then DEA can approve, they can cut, or they can
6 adjust the quota as they see they -- as DEA feels is the
7 amount they need.

8 MR. FARRELL: Judge, I'm going to continue my
9 objection to this witness testifying about the purpose and
10 function of the regulatory duties of the DEA with regard to
11 quotas.

12 THE COURT: Well, it's his understanding of what
13 -- what his company's obligations are with regard to the
14 quotas, as I understand the question, so I'm going to allow
15 it.

16 BY MR. NICHOLAS:

17 Q. Other than the manufacturer, is anyone in the supply
18 chain involved in the setting of quotas?

19 A. The DEA approves them. I'm not sure that -- that's all
20 I know.

21 Q. Okay. Is AmerisourceBergen involved in this at all?

22 A. No.

23 Q. Has AmerisourceBergen ever been involved with quotas?

24 A. No.

25 Q. Okay. Let's transition to regulations, if we might.

1 Mr. Zimmerman, as the Senior Vice President of CSRA, are you
2 familiar with the Controlled Substances Act?

3 **A.** Familiar with the act, but more so the Code of Federal
4 Regulations, which are promulgated by the act.

5 **Q.** Okay. Is AmerisourceBergen a registrant under the
6 controlled system -- Controlled Substances Act?

7 **A.** Yes. Each one of our distribution centers holds a DEA
8 registration.

9 **Q.** Okay. So, we've heard about the general requirements
10 of the Controlled Substances Act already in this case and
11 I'm going to display that. I'm going to -- I just want to
12 -- they're expressed in Section 1301.71. I just want to
13 display the section, if I might.

14 Do you recognize this, this language in this section?

15 **A.** Yes.

16 **Q.** Okay. We don't have to -- what I really want to do is
17 go to the question of whether there are more specific
18 requirements than this for distributors under the act?

19 **A.** Yeah. And, as I've mentioned, you see it applies to
20 manufacturers, distributors and dispensers.

21 **Q.** Right.

22 **A.** So, they all -- that requirement applies to all.

23 **Q.** So, this is the broad section, and then there are
24 specific -- all right. So, is this the broadest of the
25 sections?

1 **A.** Yes. So, the CFR, they'll take security requirements
2 and then, they'll identify who they belong to. So, some
3 will be maybe manufacturers, distributors. Some will be
4 just distributors. Some may be just pharmacies. Some might
5 be practitioners. And they break it in, but some are
6 overarching like security; you know, your responsibility to
7 prevent diversion, those type of overarching --

8 **Q.** Are there specific requirements for distributors under
9 the act?

10 **A.** Yes.

11 MR. FARRELL: Objection, Your Honor.

12 THE COURT: Basis?

13 MR. FARRELL: Testimony on the legal duty of the
14 law. There's rulings Your Honor has made that has
15 prohibited the plaintiffs from proffering such opinions and
16 now the defense is either opening the door or should be
17 precluded from doing the same.

18 THE COURT: Well, it's his understanding of what
19 his company's obligations are and I'll overrule the
20 objection.

21 BY MR. NICHOLAS:

22 **Q.** And can you tell us what the categories of the specific
23 requirement for distributors are?

24 **A.** There's the security section. There's recordkeeping,
25 which goes to the proper recordkeeping for adequate controls

1 for inventories and such, and then there's a general section
2 for narcotics. I mentioned the narcotic order forms.

3 **Q.** Okay. Is there anything about suspicious orders?

4 **A.** Suspicious orders falls under the security requirements
5 and, as you see in that section there, it says for a
6 registrant to determine if they have adequate control to
7 prevent diversion, it tells you there to refer to these
8 sections, 130.172-130.176. The suspicious reporting
9 requirement is 130.174, I believe, would fall in that.

10 **Q.** Okay. And with the exception of what we've just --
11 what you just covered, are there any other requirements?

12 **A.** For the DEA or just for our company?

13 **Q.** Yeah.

14 **A.** I think that pretty much sums it up from the DEA. I
15 mean, yeah.

16 **Q.** Does the DEA do anything to make sure that you're
17 following these regulations?

18 **A.** Yeah. They -- they'll routinely audit the registrants
19 during -- you know, for my 31 career, sometimes we would
20 have 25 audits in a year. Sometimes we would have eight.

21 They are mandated -- I believe they're mandated to
22 conduct a certain amount like once every two years. I'm not
23 sure if that changes over time, but they have to come and
24 inspect the distributors on a certain cycle and
25 manufacturers, which they do regularly.

1 MR. FARRELL: Objection, Your Honor. Again, it's
2 imposing duties that he believes that the DEA has. This is
3 not only testimony that you have ruled upon, but it's
4 testimony that defendants have objected to when we tried to
5 elicit similar testimony from Thomas Prevosnik, 30(b)(6) of
6 the DEA. They should not be allowed to have it both ways.

7 MR. NICHOLAS: Your Honor, if I might respond. I
8 don't -- I mean, I don't know what happened in Mr.
9 Prevosnick's 30(b)(6) deposition, but if I'm recalling the
10 direct -- the cross examination of Mr. Zimmerman from this
11 morning and yesterday, we had all kinds of questions and
12 answers pertaining to these kinds of things.

13 I think this is -- I -- you know, I'm really -- when
14 you said before that I'm not allowed to lead, I agree, as
15 long as I'm directing him, but all of this is arguably
16 responsive to the cross examination, as well. So, I think I
17 need to lead, number one, and I think the subject matter is
18 totally appropriate for this, of all witness, of any witness
19 to --

20 THE COURT: I'll overrule the objection. You can
21 -- you can pursue this.

22 MR. NICHOLAS: Okay.

23 BY MR. NICHOLAS:

24 **A.** So, the -- I think the audit question.

25 **Q.** Yes.

1 **A.** So, they audit our facilities, you know, not just DEA,
2 but all other regulatory agencies. I think, last year, we
3 had over 230 different inspections, visits, audits, just
4 last year alone.

5 And they come in and they'll have set guidelines to
6 ensure that we have proper -- proper procedures and
7 processes in place to prevent diversion and also meet all
8 the requirements of the CFR. And so, sometimes, they last a
9 couple days. Sometimes, they go a few weeks.

10 They do a reconciliation. They check the alarm
11 systems. They look at our customer files. They look at our
12 suspicious orders. They look at everything that you find in
13 the Code of Federal Regulations and that occurs regularly.

14 **Q.** All right. Let's focus on the physical security
15 requirements under the regulations. This is Section
16 1301.72; is that correct?

17 **A.** Yes.

18 **Q.** All right. And I'm displaying the section -- I think
19 it's actually a two-page -- so, there's two pages, but we
20 can go back to the first of the two pages. Now, these
21 requirements are extremely detailed; is that correct?

22 **A.** They're very -- they're very well -- they're extremely
23 detailed for -- in order to ensure you have proper security
24 requirements.

25 **Q.** Can you give us a sense of the level of detail in this

1 requirement?

2 **A.** So, when we're talking about controlled substance
3 storage areas, it's so detailed to the fact that they tell
4 you the gauge. You have to have ten-gauge wire in a cage.
5 The openings can't be more than two and a half inches and
6 diagonal.

7 They have to -- you know, your posts have to be no more
8 than ten feet apart. They have to be at least one inch in
9 diameter. The bolts, as I mentioned yesterday, have to be
10 brazed to the floor.

11 Your vaults have to have to have eight-inch
12 poured-in-place concrete with rebars.

13 COURT REPORTER: I'm sorry. Slow down for me,
14 please.

15 THE WITNESS: I'm sorry. Eight-inch
16 poured-in-place -- and it's all in that -- all in that
17 detail, but eight-inch poured-in-place concrete with rebar
18 every six inches apart.

19 So, when we build a facility, the DEA has to come out
20 and look at the structure before we even pour the cement and
21 sign off on it. And they test that when they do our -- when
22 they do our audits, as well.

23 It also includes the alarm system. You have to have
24 certain vibration alarms, heat alarms, motion detections.
25 Doors have to be self-closing and locking. All of that is

1 contained within the regulation, that level of detail. So,
2 when you're going to open up a facility, a distributor, then
3 they tell you exactly how to do it.

4 It's also defined on how the pharmacies don't have to
5 have that level of security. They can disperse the product
6 throughout -- on their shelf. That's why, for security
7 reasons, we'd rather the opioids stay in the distribution
8 centers in our cages and vaults and not on the shelf.
9 That's why we have the orders every day.

10 **Q.** Can you explain the process for when the company takes
11 control of a prescription opioid from a manufacturer from --
12 starting at the dock?

13 **A.** So, because of the type recordkeeping requirements I
14 mentioned, when the DEA comes in and does an accountability
15 review, they want it to be lined up a hundred percent. So,
16 when narcotics -- well, I guess we'll use Schedule II
17 narcotics. When it comes in the receiving dock, that
18 product's received in receiving. It's then immediately
19 taken to the vault area.

20 It's received a second time and then put on the shelf.
21 And then, the very next day, we do a complete inventory of
22 all movement of that drug to ensure what was received in
23 receiving was received at the vault and was put on the shelf
24 in the right location. And we do that every day because, if
25 we wait a week and do an inventory, it takes too much --

1 takes too much time to try to track it down.

2 **Q.** Are there any other times when you take an inventory?

3 **A.** So, in addition to the daily accountability, we do a
4 complete monthly inventory of the cage involved, as well,
5 just in -- just in the event that, heaven forbid, there's
6 any internal theft. We want to identify that, as well, and
7 we do that on the shipping part, as well.

8 **Q.** And who gets this information?

9 **A.** Who gets the --

10 **Q.** The inventory information?

11 **A.** Well, our reporting requirements report to the DEA.
12 So, they -- everything we receive in is reported to the DEA.
13 So, if it's Schedule II, as I mentioned, that's transmitted
14 to the DEA.

15 **Q.** Do you conduct criminal background checks for your
16 employees?

17 **A.** One of the requirements in the CFR is you have to
18 ensure you don't have anyone working in your facility that
19 has a -- has a past drug charge. So, we perform criminal
20 background checks on all of our employees upon hire. And
21 then, any employee we designate as compliance critical,
22 which are those that work with controlled substances,
23 whether it's at the receiving dock, in the cage, or the
24 vault, they have a -- they have a criminal background check
25 every year.

1 **Q.** Do you take precautions when the product is on the
2 trucks?

3 **A.** So, as the registrant and the way the Code of Federal
4 Regulations is written is that we're responsible for the
5 product from the time we sign for it until the time the
6 pharmacy signs for it, which there's a whole section that
7 talks about transportation and our responsibility to ensure
8 we hire carriers that have adequate securities.

9 Any losses that happen from when we -- they pick it up
10 on our dock before it gets to the pharmacy is the
11 responsibility of the distributor.

12 **Q.** Does CSRA have anyone that -- have personnel in the
13 distribution centers around the country?

14 **A.** So, from the org charts from yesterday, you saw that
15 there's CSRA managers at each of the facilities and they
16 each have a staff. There's a lead and then there's
17 specialists under that. And they ensure that the operation
18 is doing the receiving process that I explained.

19 It's the same process on the shipping. We double check
20 every single controlled substance order. And then, that
21 also goes on the accountability list. So, they're ensuring
22 that all the policies are being followed.

23 They also conduct all the -- all the training at the
24 facility, the regulatory training. We talked about
25 suspicious order monitoring at the location. They conduct

1 the annual training for all the employees for regulatory
2 requirements.

3 **Q.** Now, I think we've already -- we've heard testimony
4 already in this case that the Lockbourne Distribution Center
5 is the distribution center that was distributing into West
6 Virginia and including Cabell County and Huntington. Is the
7 Lockbourne Distribution Center licensed by the DEA?

8 **A.** Yes, they are.

9 **Q.** Are all of your distribution centers licensed by the
10 DEA?

11 **A.** They are. And because of our process and our program,
12 it has -- it's standardized. So, that whole process I'm
13 describing, whether security, recordkeeping, how we receive
14 product, how we ship product, that's the same at every
15 distribution center. It's standardized across the board.
16 So, everything that Lockbourne would have, all our other
17 distribution centers would have, as well.

18 **Q.** So, is it correct that all of the physical security
19 requirements and things that you do to comply with those
20 requirements are in place in the Lockbourne facility?

21 **A.** Yes. And so, when it -- in addition to the government
22 auditing us every two years, that's the internal CSRA Team I
23 mentioned. They perform two self-assessments of the entire
24 operation every, every year.

25 So, in addition to the DEA, we're auditing ourselves.

1 And then, on top of that, the Office of Compliance also
2 performs an audit to make sure that the distribution centers
3 are operating as designed.

4 **Q.** Is the securing of these products when they are in your
5 possession a large part of AmerisourceBergen's
6 responsibility in protecting against diversion?

7 **A.** Yes. We have to -- as soon as we receive those
8 products, I mean, they're put in a vault and they're counted
9 regularly. We have -- we have limited access control. Only
10 certain members of the -- only certain employees can access
11 those systems and everything is card-key. So, we know every
12 single person that goes into those storage areas and what
13 time they leave.

14 So, rarely, in the event we do have a theft issue, we
15 can usually pinpoint the time because we're counted so often
16 and we pinpoint every single person that had access to it.

17 MR. NICHOLAS: Your Honor, this is a natural break
18 point for me.

19 THE COURT: Well, we need to relieve the court
20 reporter, so we'll be in recess for about ten minutes. Come
21 back at about 20 till 4:00.

22 (Recess taken)

23 (Proceedings resumed at 3:42 p.m.)

24 THE COURT: All right, Mr. Nicholas, you may
25 go forth.

1 MR. NICHOLAS: Thank you.

2 BY MR. NICHOLAS:

3 Q. Mr. Zimmerman, has the diversion control program
4 evolved over time?

5 A. Yes, since I've been with the company.

6 Q. Were you personally involved in designing and operating
7 the program starting in 1990 when you joined the company?

8 A. Yes. I was working -- that was one of the first things
9 I did was -- actually, my very first day at work I came
10 in -- I started on January 2nd and most of the office was
11 out.

12 So I came in and admin said, "We need you to mail these
13 reports to these DEA offices." And they were the suspicious
14 order reporting at the time. That was my very first
15 function.

16 Q. I want to ask you about the time period from 1990 to
17 1998. In the early '90s -- well, what did the program look
18 like -- briefly, what did the early '90s -- what did the
19 program look like in the early '90s?

20 MR. FARRELL: Objection, Your Honor.

21 THE COURT: Basis?

22 MR. FARRELL: This is outside the temporal scope
23 of the discovery that the defendants insisted on dating back
24 to the early days of the MDL. We were restricted from
25 discovery prior to the -- prior to 2006.

1 THE COURT: Well, you're asking him the history of
2 his involvement in the diversion program. Right?

3 MR. NICHOLAS: That's correct.

4 THE COURT: Overruled. I'll allow it.

5 BY MR. NICHOLAS:

6 **Q.** What did the program look like in the early '90s?

7 **A.** So in the early '90s, it was a two-step process. One
8 was we did the training at the distribution centers with the
9 employees to ensure that those who were picking those orders
10 had the responsibility if they saw something suspicious,
11 whether it was pattern, frequency. They would have the
12 obligation to contact the DEA office and report it.

13 It also consists of a monthly report that compared all
14 pharmacies to one another and then created an average. And
15 then the average produced was on the report which was mailed
16 to the local DEA office each month.

17 **Q.** And how was your interaction with the DEA during that
18 time period?

19 **A.** Good. I -- we would meet every six months. The
20 industry would meet with DEA at DEA's office. And then in
21 six months the DEA would come to had -- at the time, it was
22 called the NWDA -- at their office and we would have just
23 open discussion about the environment, what was occurring,
24 any trends that we were seeing, any trends that they were
25 seeing. It was a shared, shared correspondence.

1 MR. FARRELL: Objection, Your Honor. He's
2 testifying about conversations that happened with the trade
3 organization that we were prevented from going into in other
4 contexts.

5 THE COURT: I'll sustain that one, Mr. Nicholas.

6 BY MR. NICHOLAS:

7 Q. Please don't make any references to any trade
8 organizations. With that, you can go on.

9 A. So we would regularly meet. And when we would have a
10 new business initiative, opening up a distribution center,
11 potential acquisition, there was a lot of interaction with
12 the DEA at that time. And we had a great -- you know, I had
13 a -- I thought we did have a really good working
14 relationship.

15 Q. Will you give us just -- without describing them in
16 detail just a couple of examples of how the distribution
17 centers worked with DEA specifically on issues?

18 A. So as, as I mentioned on the suspicious order
19 reporting, it wouldn't be uncommon if they had a call with
20 the DEA office, one regarding an issue itself.

21 But, again, on a multitude -- if there was a loss or an
22 inventory discrepancy or an issue with the alarm system,
23 anything that had to do with the Code of Federal
24 Regulations, they would contact the DEA, whether it was to
25 alert them of the issue, inform them of the issue, or seek

1 guidance.

2 And in the same, same note, DEA would call the -- they
3 would contact the local distribution center themselves. So
4 there was a good working relationship.

5 One of the things I would do when I would audit a
6 facility is I always set up appointments with the local law
7 enforcement, with the local DEA office, and the Board of
8 Pharmacy just to give them a general awareness of what we do
9 and introduce myself so when you're talking to somebody on
10 the phone that there's a little bit of a personal contact.
11 And it just seemed to really help when things would happen.

12 So it was really to have, build that trust with one
13 another. In the event of an emergency, you really need to
14 rely, then you had somebody to trust and work with.

15 **Q.** And, and just one more question on this. How about
16 previous -- other prior epidemics? Did you work with them
17 on that?

18 **A.** So we worked with the DEA on a whole multitude of
19 issues that arose. I think I mentioned, you know, at the
20 very beginning when I first started on the rescheduling of
21 steroids into a Schedule III. We worked with them on --
22 when pseudoephedrine was being stolen from pharmacies -- or
23 not pharmacies, but really retail stores and they were
24 making methamphetamine. We worked with DEA on that. I've
25 also worked with them on suspicious order reporting.

1 But continuously always, you know, hand-in-glove
2 working with them. CSRA is the DEA internal -- we worked --
3 you know, I heard the term "adversary." I look at them as
4 more of a partner. They have the same -- we have the same
5 mission to protect the supply channel. And, so, we're
6 really -- we're not -- we weren't at odds.

7 **Q.** In 1996 did you approach the DEA with an idea with
8 regard to your program?

9 **A.** I did, yeah. It was, again, borne from, borne from
10 those meetings that I would have with them when I would do
11 my audits. You know, "How is everything going? What do you
12 like? What don't you like?" They would always complain
13 about the phone calls.

14 And, so, I reached out to Washington, Washington, D.C.
15 to see if there was something that we could do to make the
16 process better for them and --

17 **MR. FARRELL:** Objection, Your Honor. This is
18 lobbying to government to change the rules.

19 **MR. NICHOLAS:** I object to the objection. That's
20 not what he's doing. I think he's interrupting the witness
21 when he's trying to answer the question.

22 **THE COURT:** Overruled. Go ahead.

23 **THE WITNESS:** If I said Washington, I meant the
24 DEA Washington -- I apologize. I meant the DEA office in
25 Washington, not Washington, D.C. lobbying activity. This

1 was working with -- and it wasn't to change the regulation.
2 It was how can we -- the regulation is very vague. Right?
3 Frequency, pattern, and quantity. That's it. And report
4 when identified. That's it.

5 So I was looking to better clarify that vagueness and
6 something that would work because I'm being told from the
7 DEA to stop calling, but our regulatory requirement is you
8 have to report a suspicious order when identified. We have
9 to keep calling.

10 And, so, that was putting us in a little bit of
11 friction with the DEA office that the person that's auditing
12 you and going to be enforcing is telling you to stop, but
13 you have a, you have an obligation to by the regulations to,
14 to continue. So that was the basis of the initiation of
15 the, of the program.

16 BY MR. NICHOLAS:

17 **Q.** And during the next two years from 1996 to 1998,
18 did you work to develop that better program?

19 **A.** We did. So we first started -- we looked at the old
20 report, compared all pharmacies together. We worked with
21 DEA, and they thought it would be more informative if it
22 compared a specific pharmacy to itself so it could identify
23 its own patterns or frequency or quantity.

24 They, they wanted to have full flexibility to, to alter
25 that, that trigger amount we heard three times was the

1 default, but they could change it to one or to 10.

2 Another one was they didn't want -- they wanted it
3 faxed to them so it didn't have to take up the time in
4 answering the phone and we could have that faxed to them so
5 when they came in in the morning, the report would be at the
6 office. And, so, that would meet the -- would identify the
7 requirement in the regulation.

8 **Q.** And did you work with the DEA in developing this new
9 program?

10 **A.** Yeah, we worked on what we wanted to try to accomplish.
11 And then our IT department went and developed, developed the
12 program, put it into production, and then we tested it. So
13 we were -- and the whole time, we still maintained our daily
14 reporting. We still maintained that monthly report I
15 described.

16 So we were still maintaining our program as it had been
17 since the '80s. So we were testing out the new program with
18 the new parameters and we started with one office expanding
19 to another office. I think it expanded to, you know, a
20 third fairly quickly. And we utilized it until we got full
21 approval to implement it nationwide.

22 **Q.** And when you say you started in one office, did the DEA
23 allow you to test your program in their field offices?

24 **A.** It -- so it was tested in our distribution centers, but
25 the reports went to the field offices which was the

1 requirement. So those -- we would -- I think L.A. was one,
2 Los Angeles.

3 So the L.A. office when they came in in the morning,
4 they would have a stack of suspicious orders that had been
5 reported from the orders of the night before.

6 **Q.** Now, did all of this culminate in an approval by the
7 DEA of your program?

8 **A.** Yes.

9 **Q.** Was the approval in writing?

10 **A.** Yes.

11 MR. NICHOLAS: Can we display, Ritchie,
12 AM-WV-00781.

13 BY MR. NICHOLAS:

14 **Q.** Do you recognize this letter?

15 **A.** Yes.

16 **Q.** Was this letter addressed to you?

17 **A.** Yes, it was.

18 **Q.** What is the date on the letter? Can you see it?

19 **A.** July 23rd, 1998.

20 **Q.** And did you read the letter when you received it and do
21 you recall it?

22 **A.** Yes, we did.

23 **Q.** Everyone has one except you.

24 MR. NICHOLAS: May I approach?

25 THE COURT: Yes.

1 MR. NICHOLAS: Everyone except you and me have
2 one.

3 Your Honor, at this time I would offer this letter into
4 evidence, into evidence.

5 THE COURT: What about all the stuff that's
6 attached to it?

7 MR. NICHOLAS: Actually, thank you for reminding
8 me. That's very important.

9 BY MR. NICHOLAS:

10 Q. Can you take a look at the attachments to this
11 letter and tell us what they are?

12 I'll try to streamline this. Are the attachments to
13 the letter prior correspondence between you and the DEA
14 about the development of this program?

15 A. Yes.

16 Q. All right. And flipping through it, do you recognize
17 all of that correspondence?

18 A. I do.

19 Q. And was it all either to you personally or from you
20 personally?

21 A. Yes.

22 Q. Okay.

23 MR. NICHOLAS: Your Honor, what I will offer into
24 evidence is the packet, is the group of documents.

25 THE COURT: Is there any objection?

1 MR. FARRELL: I'm flipping through it, Judge.

2 (Pause)

3 MR. FARRELL: The only objection I would have,
4 Your Honor, is whether or not this is the complete set of
5 communications that were discussed in Thomas Prevoznik's
6 deposition. And to that extent, we have no objection.

7 MR. NICHOLAS: It is -- I believe it is the
8 complete set. But, in any event, I offer it into evidence.

9 THE COURT: I think what you've offered is
10 admissible in and of itself and I'll admit it.

11 BY MR. NICHOLAS:

12 Q. All right. Can we look at just the first sentence,
13 please, and can you read the first sentence of the
14 letter out loud -- well, read the first sentence out
15 loud for the record, please.

16 A. "This is to grant approval of your request to implement
17 on a nationwide basis your newly developed system to
18 identify and report suspicious orders for controlled
19 substances and regulated chemicals as required by the
20 federal regulation."

21 Q. Read the second sentence, please.

22 A. "DEA managers who have been involved with the testing
23 of the system have relayed their positive opinions regarding
24 its ability to provide information in a fashion which is not
25 only useful overall but is also responsive to the needs of

1 the individual DEA offices."

2 **Q.** And read the first sentence of the second paragraph and
3 then we can stop with the reading.

4 **A.** "We appreciate the efforts you have undertaken to
5 develop this improved system and apologize for the lengthy
6 approval process."

7 **Q.** Thank you, Mr. Zimmerman.

8 Now let's just display one more version of this
9 document, please. And that is AM -- that is 02658.

10 Is this the same -- first of all, take a look at this.
11 Is this the same letter?

12 **A.** Yes.

13 **Q.** Okay. I'm going to direct your attention to the only
14 difference in the letter and that is way at the bottom and
15 that's it. It says on the bottom "Subject: Approve
16 suspicious order monitoring system." Do you see that?

17 **A.** Yes.

18 **Q.** Okay. And that is the only difference in the letter.

19 MR. NICHOLAS: I offer this letter into evidence
20 as well.

21 THE COURT: Any objection?

22 MR. FARRELL: Judge, I don't know that the
23 foundation has been laid. It's Bates stamped on United
24 States DEA.

25 THE COURT: Well, he testified that he received

1 it.

2 MR. FARRELL: Yeah, but I think that the bottom
3 portion they're trying to --

4 THE COURT: Oh, I see, yeah.

5 Well, what about that, Mr. Nicholas?

6 MR. NICHOLAS: Hold on one second. I've got to
7 consult with my smarter friend. I'll be right back.

8 THE COURT: Well, obviously I have smarter friends
9 that help me.

10 (Pause)

11 MR. NICHOLAS: Okay. What we're checking to see
12 is whether we have a stipulation to the foundation of this
13 with the plaintiffs that would permit its -- to permit -- to
14 permit it to be admitted on foundational grounds. We'll
15 check and I can move on while we're --

16 THE COURT: Well, I'm going to, I'm going to admit
17 it.

18 MR. NICHOLAS: Okay. Good, great. Thank you.

19 BY MR. NICHOLAS:

20 **Q.** Now, did you communicate or send this approval
21 letter to anyone on your team?

22 **A.** Yes. So this was -- once we implemented the new
23 program nationwide, we had sent the copy of the letter to
24 each of the distribution centers to keep in their records
25 for the process when the DEA would perform their audits.

1 **Q.** So it could be shown to the DEA?

2 **A.** If, if requested.

3 **Q.** Okay. And, and just quickly, what were the
4 highlights -- without going into a lot of detail, what were
5 the highlights of the improvements that you made?

6 **A.** So other than the immediate fax versus a phone call was
7 one. It made it much more efficient. And I hate to say the
8 fax was breaking technology at the time, but the advanced
9 technology we implemented was the fax machine. That was a
10 big change.

11 But really the customer to themselves versus everybody
12 in one bucket, and then the flexibility that it gave the DEA
13 which is referenced in the letter. They could tailor make
14 it to whatever they want. They could set the thresholds to
15 zero. They could focus on one item.

16 So if Houston is having a Promethazine problem, they
17 could set that threshold to zero and get every order for
18 Promethazine sold on a daily basis. So really the tool --
19 they could report suspicious orders, but they could also use
20 it as an investigative tool as well.

21 **Q.** Was this pretty advanced for the industry at the time?

22 **A.** I'd like to think so. I -- you know, in all, all
23 fairness to our counterparts, I always like to think that my
24 department does a great job and we're always looking for
25 better ways to do things and, you know, which is some of the

1 frustration. We were always trying to make sure we're
2 following the rules and applying the regulations
3 appropriately.

4 **Q.** Now, under this new, this new approved program, was
5 AmerisourceBergen required to hold and not ship suspicious
6 orders?

7 **A.** No.

8 **Q.** All right. Did the DEA know that?

9 MR. FARRELL: Objection, Your Honor, lack of
10 foundation.

11 THE COURT: Well, if he, if he knows.

12 THE WITNESS: We tested with the DEA for two
13 months, and we were releasing the orders that were flagged
14 that we were reporting. So I don't know how they would not
15 know.

16 THE COURT: Overruled.

17 BY MR. NICHOLAS:

18 **Q.** So is it correct that the DEA approved the 1998
19 program that included reporting suspicious orders after
20 shipping them?

21 **A.** Yes.

22 **Q.** Now, why would you ship orders that were suspicious?

23 **A.** Again, we, we reported our orders that we felt were
24 suspicious, but we would ship the -- we shipped the order
25 not to impact patient care and the supply channel.

1 Now, that isn't to say that there's not an order that
2 we would, we would just ship anything. So, I mean, there
3 are instances where we get something that we won't ship
4 because we just don't feel comfortable, you know. There are
5 unique circumstances.

6 We had an individual show up wanting to buy a pallet
7 full of pseudoephedrine, which was a listed chemical at the
8 time, for cash. And our person called from the DC saying,
9 "I have somebody here who wants to buy a --" not even a
10 pharmacy, just somebody walking in. That's a suspicious
11 order when somebody walks in wanting to buy a listed
12 chemical with cash.

13 And we just told the person to come back the next day.
14 And, so, it gave us time to notify DEA so we could arrange
15 for that situation.

16 But that's -- I mean, again, suspicious orders are
17 those to help DEA to alert them that potential -- there
18 could be, you know, something they need to look into, things
19 that they can do that we can't.

20 And, so, when I started with the company, we would ship
21 orders that we identified as suspicious. They -- and,
22 again, our assumption is that if there was an issue with the
23 pharmacy, that they would either revoke the license or
24 inform us to stop shipping.

25 Q. Did you train your personnel -- I'm sorry. Did you

1 train DEA personnel on the new program? Did
2 AmerisourceBergen do training for DEA people on your new
3 program?

4 **A.** Yes. We informed them how, how it worked. Then, you
5 know, in addition to other regulatory requirements, we
6 trained them -- helped train them as well.

7 **Q.** And were these -- were there training sessions?

8 **A.** Yes. So for the Code of Federal Regulations as a
9 whole?

10 **Q.** On your -- pertaining to your new program.

11 **A.** For the new, for the new program we had -- I don't know
12 if we had specific training programs for the DEA. For our
13 people, we did. And then part of our training we did with
14 the DEA I think initiated in the late '90s. It would
15 include that portion as well.

16 **Q.** Okay. Were these early training sessions supervised by
17 you?

18 **A.** Me and my team, yeah.

19 **Q.** Okay. In 2005 did the DEA meet with your colleague,
20 Steve Mays?

21 **A.** Yes.

22 **Q.** Okay. Do you have a general understanding of what was
23 discussed?

24 **A.** Yes.

25 **Q.** Okay. Can you tell us generally what that was?

1 **A.** When Steve came back from the 2005 meeting, it was more
2 in reference to internet pharmacies that they had -- that
3 the DEA was experiencing that required higher levels of
4 opioids that were being filled through this internet
5 mechanism and wanted to bring it to our attention and be
6 aware of that.

7 **Q.** So were internet pharmacies the focus of that meeting
8 in 2005?

9 **A.** That's the take I got when Steve came back was the, the
10 impetus of the meeting.

11 **Q.** Okay. Mr. Mays will testify, so we'll hear more from
12 him.

13 **A.** Yes.

14 **Q.** But after that meeting, did the company make some more
15 improvements in its program?

16 **A.** Yeah. Based on the meeting, they wanted us to take --
17 you know, if you're seeing higher levels of opioids to
18 conduct, you know, look into them further.

19 I think we opened up around 100 investigations. After
20 that point, we modified the policy to include that process
21 and conducted investigations of higher level opioid
22 purchasers.

23 **Q.** Did the improvements made after 2005 include
24 development of a due diligence questionnaire?

25 **A.** Yes.

1 **Q.** Okay. And that questionnaire was for your customers;
2 correct?

3 **A.** It was for the customers that we identified that needed
4 additional investigation, let's say, based upon the volume.
5 And if they were conducting internet operations at that
6 time, as long as they met the requirements of having a
7 physical patient/doctor relationship and met all the
8 requirements, it could be legal. But if they weren't, then,
9 then it would be illegal.

10 So if a pharmacy claimed to us they were conducting
11 internet business, we would have a form that they would have
12 to complete to understand they were doing it within practice
13 or not.

14 **Q.** All right. Let's talk about the period beginning in
15 2007. In 2007, when the year began, were you still
16 operating under the 1998 approved program?

17 **A.** Yes.

18 **Q.** Did something happen in the middle -- did something
19 happen sometime in 2007 that changed all that?

20 **A.** Yes.

21 **Q.** All right. Can you tell us what happened?

22 **A.** We received an order of show cause and immediate
23 suspension of our Orlando distribution center in April,
24 2007.

25 **Q.** Now, before we go any further, the Orlando distribution

1 center doesn't ship to -- has never supplied to West
2 Virginia; correct?

3 **A.** That's correct.

4 **Q.** All right. Let me ask you some questions about the
5 receipt of the Immediate Suspension Order.

6 First of all, had anything like that ever happened to,
7 to you when you were with the company for all the time you
8 were with the company before that?

9 **A.** No. I had never experienced an Immediate Suspension
10 Order to show cause since I started with the company.

11 **Q.** Have you ever experienced an Immediate Suspension Order
12 to show cause since that one event in 2007?

13 **A.** No.

14 **Q.** So that's the only time?

15 **A.** Yes.

16 **Q.** Okay. Given your entire time with the company and all
17 of your experience with the DEA, was this something that you
18 would have ever expected to happen?

19 **A.** No.

20 **Q.** Was it a surprise?

21 **A.** It was, it was a shock. So, you know, my first -- let
22 me see, 2007. So my first 17 years has been working, like I
23 said, together as partners with the, with DEA and not
24 adversarial whatsoever. That's not to say we didn't have
25 issues that they may find on our audit that we'd have to

1 correct from time to time by any means. But, you know,
2 we -- I thought we worked really well together.

3 And we went to the 2005 meeting. We implemented a new
4 policy. We opened up additional investigations. We had
5 open dialogue with the Orlando DEA office. In 2006 they
6 submitted us a list of questionable pharmacies. We
7 investigated them. We shut some down. We denied others
8 from opening. This is in 2006.

9 And then, you know, to get the Immediate Suspension
10 Order as we're working with the local DEA office was a shock
11 without any notice of any issues going on in Florida.

12 **Q.** Now, the information you received with regard to the
13 suspension order had to do with four specific pharmacies; is
14 that correct?

15 **A.** Yes.

16 **Q.** All right. And at that point in time when you received
17 the suspension order, were you still doing business with all
18 four of those pharmacies that you got, got an order for?

19 **A.** No. I believe three of them we had, three of them we
20 had shut -- not shut down. We had stopped servicing and had
21 communicated that to the DEA office.

22 **Q.** Okay. Now, eventually this was worked out in
23 conjunction with the DEA; correct?

24 **A.** Correct.

25 **Q.** All right. Was there -- and there was no fine imposed

1 in connection with this at the end of the day; is that
2 right?

3 **A.** That's correct.

4 **Q.** Okay. Has AmerisourceBergen ever been fined by the
5 DEA?

6 **A.** Not, not with my company, not with Bergen Brunswig or
7 since the merger in 2001, so since 1990 for me.

8 **Q.** So the answer to that question is "no"?

9 **A.** Yeah.

10 **Q.** Now, as part of that agreement -- so eventually what
11 happened after -- you know, what happened after that that
12 resulted in a new -- let me start again. After all was said
13 and done, you came out with a new program in 2007. Is that
14 correct?

15 **A.** That's correct.

16 **Q.** Okay. And that was in connection with working with the
17 DEA; is that right?

18 **A.** That's correct.

19 **Q.** Okay. And as part of that agreement between
20 AmerisourceBergen and the DEA, did AmerisourceBergen agree
21 to send a report of all sales of controlled substances to
22 the DEA on top of its suspicious order reporting?

23 **A.** Yes.

24 **Q.** Okay. What was -- so I'm going to refer to this new
25 program in 2007 as the enhanced program. All right?

1 **A.** Okay.

2 **Q.** What was the major change in the enhanced program that
3 you, that you agreed to undertake after this -- after these
4 discussions with the DEA?

5 **A.** So it, it was comprised of a more in-depth due
6 diligence process of on-boarding new pharmacies, which
7 included the verification of a license, but also a
8 pharmacist and information about the owner, size. Again,
9 because of the internet process, we would do searches and
10 see if they had a website, if they were taking orders on the
11 internet, things like that. So it was enhanced due
12 diligence portion.

13 And then the actual reporting of itself, which you
14 remember pre-'98 all pharmacy customers together from '98 to
15 '07, every customer to themselves. And then this new
16 enhanced system was back to comparing all pharmacies in a
17 bucket, but we then broke them into groups so you didn't
18 have all these pharmacies and then one multiplier. We had
19 one -- pharmacies broken into I think four groups.

20 **Q.** What about the shipping requirement?

21 **A.** We also spoke to -- spoke to. We also -- part of the
22 negotiation was that if an order is identified as an order
23 of interest, then it's blocked and we review that order.
24 It's not shipped. We review the order. And if we determine
25 it's not suspicious, we can release it. And if we do

1 determine that after investigation it's suspicious, we
2 report it to DEA and it's not shipped.

3 **Q.** So was this the first time -- so from this time forward
4 did, did AmerisourceBergen ship orders that were suspicious
5 orders?

6 **A.** They shipped -- they shipped the orders that were
7 identified as suspicious by the report, yes.

8 **Q.** Going forward from beginning -- under the new program,
9 did AmerisourceBergen stop shipping suspicious orders?

10 **A.** Yes.

11 **Q.** Okay. Before the new program, --

12 **A.** Yes.

13 **Q.** -- AmerisourceBergen had?

14 **A.** Yes.

15 **Q.** Run this by us again because it's important. I just
16 want to make sure we have the sequencing correctly.

17 **A.** Yes. So, again, the shipment requirement -- I'm not
18 really sure what -- so from '90 to '96 we would send the
19 report, find the order and ship it.

20 From '96 to '98 working in conjunction with DEA and
21 their offices and Washington, D.C., we would identify the
22 suspicious order and ship it, which they approved in a
23 letter in writing.

24 From -- so from '98 to '07 we would identify a
25 suspicious order and ship it.

1 And then in 2007 after -- the company agreed with DEA
2 that we would not ship an order that we identified as
3 suspicious.

4 **Q.** Just one point of clarification from yesterday. I want
5 to ask you one, one question.

6 In your diversion control program, if you, if you
7 report a suspicious order and block that order, which is the
8 way it is now, has it ever been your policy that you cancel
9 all future orders for that product for that customer?

10 **A.** No. I think it -- just to clarify, so when the order
11 gets triggered in the system as potentially suspicious, it
12 won't allow that customer to place another order for that
13 product until the resolution of that one order, whether it's
14 cancelled or shipped.

15 **Q.** But it's never been -- but has it ever been your policy
16 that you cancel all future orders if you report a suspicious
17 order?

18 **A.** No.

19 **Q.** Okay. Now, prior to 2007 in all of your communications
20 with the DEA, did anyone ever tell you not to ship an order
21 that you had reported as suspicious?

22 **A.** I don't -- not that I can recall.

23 **Q.** As part of your agreement -- you've already testified,
24 I think, that as part of the 2007 agreement, you agreed that
25 ABDC -- that AmerisourceBergen would send a report of all

1 sales of controlled substances to the DEA in addition to its
2 suspicious orders; correct?

3 **A.** Yes.

4 **Q.** And that was, that was something that you agreed to do
5 for a period of five years under the agreement; is that
6 correct?

7 **A.** That's correct.

8 **Q.** But you continued to do it -- despite the fact that the
9 five years have long come and gone, you've continued to do
10 it to this day; is that correct?

11 **A.** That's correct.

12 **Q.** Was, was the DEA satisfied with this new enhanced
13 program that you put into place in 2007?

14 **A.** Yes. Part of the, part of the agreement is that they
15 would -- once we had the program up and running, as we
16 mentioned that the, the agreement was entered into in June,
17 and then we had two months where we worked with DEA and
18 operations and making sure the system was working as
19 designed like we did previously.

20 And once we felt we had it in a place where we thought
21 it was what they wanted, DEA would pick five of our
22 facilities that they would come in and do a spot check
23 unannounced. And then they would finalize that with a visit
24 to corporate where they would review our due diligence files
25 and then give us a report of what their findings were at the

1 distribution centers and the final review.

2 And at that point, if they were satisfied, they would
3 return our DEA license in Florida.

4 **Q.** Did you feel like -- did you feel like the DEA signed
5 off on your new program?

6 **A.** Yeah, or they wouldn't have given us our license back.

7 **Q.** Now, after the new program was put in place in 2007,
8 did you make a presentation about it at any point with the
9 DEA?

10 **A.** Yes. The DEA asked me if I would be willing to present
11 at their industry conference. I believe it was in November,
12 2007.

13 MR. NICHOLAS: And can we pull up, please,
14 Ritchie, Defendants' WV-002191, please.

15 Looks like we have the wrong one. No, that's the right
16 one, isn't it? Oh, that's right. Sorry. I gave you the
17 wrong document. Go back -- yeah. This is the correct
18 document. So let me hand this out real quick.

19 BY MR. NICHOLAS:

20 **Q.** While I do, is this -- this is from the DEA's
21 website pulled today, still on the website. Is this the
22 conference at which you presented in 2011 -- in 2007?

23 **A.** Yes.

24 **Q.** Okay.

25 MR. NICHOLAS: And if we just turn, Ritchie, to

1 the page I want to display, which is the second page of the
2 document, and cull out just one section of it. I think we
3 have already. Yeah.

4 BY MR. NICHOLAS:

5 Q. First of all, do you remember this conference?

6 A. I do.

7 Q. Where was it? Was it in Houston?

8 A. I believe, I believe it was.

9 Q. And was it a conference that was sponsored by the DEA?

10 A. Yes. The DEA -- I think it's every two years the DEA
11 handles a -- handles. The DEA has an industry conference
12 every two years.

13 Q. Okay. So this was the biannual, I guess, or --
14 biannual DEA conference for the industry; correct?

15 A. It's DEA's presenting to the industry. All the
16 speakers are usually from DEA from various units.

17 Q. All right. And let's cull out just the first sentence
18 of this document of what I'm displaying here.

19 Was there a section of the conference devoted to
20 suspicious orders?

21 A. Yes.

22 Q. All right. And did you and Mr. Mapes of the DEA make a
23 joint presentation or present together about suspicious
24 orders?

25 A. Yes.

1 Q. Okay. Can you just read the first sentence, please?

2 A. "Michael Mapes, Chief, DEA, Regulatory Section, and
3 Chris Zimmerman, Vice President, Corporate Security and
4 Regulatory Affairs, AmerisourceBergen updated the attendees
5 on when suspicious order reports should be submitted to
6 authorities."

7 MR. NICHOLAS: Okay. Do we have anything else
8 culled out on this document, Ritchie? This is the only
9 other thing I wanted to point out.

10 BY MR. NICHOLAS:

11 Q. Can you just read the first sentence of this
12 paragraph, of this paragraph relating to suspicious
13 orders?

14 A. Sure. "Mr. Zimmerman stressed the importance of
15 knowing your customers and providing due diligence
16 investigation on all new retail and wholesale accounts with
17 the exception of retain chain pharmacies."

18 Q. Can you keep reading, please?

19 A. "Included in the new account set-up process is a new
20 account questionnaire."

21 Q. Keep going.

22 A. "In addition, on-site visits are conducted which
23 includes the taking of photographs inside and outside the
24 premises."

25 Q. Okay. So, basically, is it correct that you were

1 describing your new program at this conference to the
2 industry?

3 **A.** That's correct.

4 **Q.** And it was side-by-side with the DEA; is that correct?

5 **A.** Yes.

6 **Q.** Okay. Let's just go to -- now we can go to the next
7 document. We may have already handed this out. So everyone
8 has this already except me and Mr. Zimmerman.

9 So can I -- just very quickly, Mr. Zimmerman, is -- can
10 you tell us whether this document that -- what is this
11 document that I've just given you?

12 **A.** This looks like the PowerPoint presentation that I did
13 at the conference.

14 **Q.** So this is the presentation you made at the conference
15 we just discussed?

16 **A.** Yes.

17 **Q.** Okay. Do you recognize the PowerPoint?

18 **A.** I do.

19 **Q.** And you remember you did, you made this presentation?

20 **A.** Yes.

21 **Q.** All right.

22 MR. NICHOLAS: Your Honor, I'll offer this into
23 evidence at this time.

24 THE COURT: I've got two documents.

25 MR. NICHOLAS: I don't need the one pager, just

1 the PowerPoint, yeah.

2 THE COURT: Is there any objection, Mr. Farrell?

3 MR. FARRELL: No objection, Your Honor.

4 THE COURT: All right. It's admitted.

5 BY MR. NICHOLAS:

6 Q. Can you turn to Page 3 of the document?

7 A. Yes.

8 Q. All right. And we can display it. All right.

9 Now, can you read the first sentence, please?

10 First of all, what does it say at the top of this
11 slide? Go ahead.

12 A. "Distributors usually implement policies that mirror
13 the Code of Federal Regulations."

14 Q. Okay. And if you go to -- then it ticks off four
15 regulations; correct?

16 A. Correct.

17 Q. And the first one is related to physical security
18 controls; correct?

19 A. Yes.

20 Q. All right. And then it describes that. And what does
21 it say at the end of that?

22 A. "No problem."

23 Q. Okay. The next section is 1304. What does that
24 pertain to under the rules?

25 A. It's the recordkeeping requirements we talked about to

1 ensure that you have adequate inventory records to prevent
2 diversion.

3 **Q.** What does it say after that one?

4 **A.** "No problem."

5 **Q.** The next one is 1305. And that's orders for Schedule I
6 and II controlled substances. What does it say after that?

7 **A.** "No problem."

8 **Q.** The final one is other security controls. And it says,
9 "Make a good faith inquiry, report suspicious orders; report
10 significant losses - gray area."

11 Do you see that?

12 **A.** Yes.

13 **Q.** Okay. And what did you mean by gray area, if you
14 remember?

15 **A.** Yes. So the first three -- the physical -- how, how,
16 how specific the requirements were. When I do records, they
17 tell me I have to do an inventory every two years. It has
18 to be signed and dated. It tells you about how to do ARCOS
19 maintenance. It tells you exactly how to perform each
20 function of the requirement for the regulation.

21 Controlled substance order forms, it tells you how to
22 cancel a line. And it doesn't mean just cancel a line. It
23 says how long you have to draw the line, not just through
24 the first part but through the entire line, and how you have
25 to write "cancel" and where you write it and when you have

1 to cancel a line. And then you have to notify the customer
2 in writing, very specific requirements to fulfill that
3 requirement.

4 When it comes to the other areas that I mentioned,
5 those gray areas are suspicious orders where it says an
6 order of unusual quantity, quantity, pattern and frequency,
7 and that's it.

8 And then on the significant losses, it's just
9 significant losses, if there's 1, 100. The distributor and
10 these requirements have to make a decision on what they deem
11 to be significant and what is deemed to be suspicious.

12 The tricky part coming -- on a security side is
13 significant. If we, we sell 100 -- we sell -- I'm sorry --
14 we sell four million pieces of product a night, every night,
15 and we fill 1.5 million lines.

16 So if somebody came to me and said, "Is one piece
17 significant?" Out of 4 million? No. But if it's one
18 bottle of a drug that, that somebody has captured that is
19 caught with, it's significant. All right?

20 So you have to determine the circumstances of what's
21 significant. But that's all put upon the registrant. It's
22 not clearly defined in the C.F.R. like the other areas.

23 **Q.** Can you turn to slide 9, please. I want you to look at
24 the second -- this slide is headed "Order Monitoring
25 Program." Right?

1 **A.** Yes.

2 **Q.** Can you read the second bullet point on your slide?

3 **A.** "Historically controlled substance/listed chemical
4 order monitoring has been based on a ship and report
5 process."

6 **Q.** Now, can you read the next line?

7 **A.** "ABC's OMP process is now based on identify, capture,
8 investigate, and report suspicious orders prior to
9 shipment."

10 **Q.** Okay. Go back to the second bullet point, please,
11 where it says, it says, "Historically controlled
12 substance/listed chemical order monitoring has been based on
13 a ship and report process."

14 You were on the dais with DEA; is that right?

15 **A.** That's correct.

16 **Q.** All right. Did your colleague on the dais at DEA
17 interrupt you and say, "That's incorrect"?

18 **A.** No.

19 **Q.** Did anyone from the DEA approach you at the conference
20 or after the conference and say, "That thing you said in the
21 presentation was not correct"?

22 **A.** No.

23 **Q.** Okay. Has anyone ever corrected that from the DEA?

24 **A.** No.

25 **Q.** Okay. Did you make essentially the same presentation

1 with further description of your improvements again in 2009?

2 **A.** So 2009 would have been the very next DEA conference
3 since they're every two years. And they asked if I would
4 come and speak again just as a progress, how the program was
5 functioning for the company.

6 **Q.** Okay.

7 MR. NICHOLAS: May I approach?

8 THE COURT: Yes.

9 MR. NICHOLAS: While we're looking at that, in the
10 meantime I will seek to move the website document that you
11 had into evidence, the other one.

12 THE COURT: Is there any objection, Mr. Farrell?

13 MR. FARRELL: No, Your Honor.

14 THE COURT: It's admitted.

15 BY MR. NICHOLAS:

16 **Q.** Just take -- all I want you to do is look at this
17 and flip through it and tell us whether you recognize
18 this as the presentation you made in 2009, two years
19 later.

20 **A.** Yes.

21 **Q.** Okay. So at this point, is it correct that you were
22 making another presentation in 2009 describing your program
23 as of that date with the, with the DEA beside you in that
24 conference and you made that presentation to the industry?

25 **A.** Correct.

1 **Q.** Okay. Okay, Mr. Zimmerman, in, in 2019 did the Office
2 of Inspector General issue a report about the DEA's handling
3 of diversion control?

4 **A.** Yes.

5 MR. FARRELL: Objection, Your Honor. The
6 defendants have made objections to our reference and
7 inclusion of the House E&C report and now they're attempting
8 to introduce the follow-up from that hearing report which is
9 the OIG report.

10 If this is permitted, it opens the door and allows us
11 to enter into the record the House hearing report.
12 Otherwise, we think that it's objectionable for the same
13 reasons stated by the defendant.

14 MR. NICHOLAS: I'm not the legal briefer on this,
15 Your Honor, but there are, there are -- you could drive a
16 huge truck through the difference between the House E&C
17 report which was, which was prepared by staffers. I mean, I
18 can go -- someone can argue the E&C motion if they want, but
19 this is simply a report issued by the Office of the
20 Inspector General with none of the markers of
21 untrustworthiness that the House E&C report has, which is
22 the whole basis for our effort to keep that out of evidence.

23 The House E&C report for a variety of reasons is not
24 trustworthy and that's, that's essentially why we're, we're
25 seeking to exclude it. There is no, there is no marker of

1 untrustworthy on this document with regard to this document.
2 It's the Office of the Inspector General for goodness sakes.
3 I mean, their, their whole job is to be impartial and look
4 at, you know, make sure that the Government is -- agencies
5 are doing what they're supposed to. It's a public record
6 and there's no basis for it. There's no, there's no
7 exception articulated here for why it shouldn't come in.

8 THE COURT: Well, have you offered it? You
9 haven't offered it yet, have you?

10 MR. NICHOLAS: I didn't have a chance. He was
11 trying to prohibit me from questioning about it.

12 THE COURT: Well, I'll let you go ahead and
13 question him about it and then we'll decide whether to admit
14 it or not.

15 MR. NICHOLAS: Okay.

16 Again, Your Honor, with my apologies for the fact that
17 I'm being reminded of something by my younger and smarter
18 friend. I would like to move the 2009 presentation made by
19 Mr. Zimmerman, the slide presentation into evidence.

20 THE COURT: Is there any objection to that,
21 Mr. Farrell?

22 MR. FARRELL: No objection.

23 THE COURT: Okay. It's admitted.

24 MR. NICHOLAS: Thank you, Your Honor.

25 BY MR. NICHOLAS:

1 **Q.** All right. Can we look at the cover page of this
2 document, please.

3 All right. First of all, do you recognize -- do you --
4 have you seen this before?

5 **A.** Yes.

6 **Q.** Is this a document that you would have -- that you
7 received in the normal course of your duties with the
8 company?

9 **A.** Yes.

10 **Q.** All right. And did you review it in the normal course?

11 **A.** I did.

12 **Q.** Okay. And what does it -- what is it called?

13 **A.** It's the review of the Drug Enforcement
14 Administration's regulatory and enforcement efforts to
15 control the diversion of opioids.

16 **Q.** And what is the heading on it? In other words, if you
17 look at the top --

18 **A.** I'm sorry.

19 **Q.** That's okay. I wanted that. But also go to the top
20 where it says -- where there's the insignia and all that.

21 **A.** "Office of Inspector General, U.S. Department of
22 Justice."

23 **Q.** Okay. And then what does it say under that?

24 **A.** "Oversight, Integrity, Guidance," and then "Review of
25 the Drug Enforcement Administration's Regulatory and

1 Enforcement Efforts to Control the Diversion of Opioids."

2 **Q.** Okay. Can we turn to Page 13 of the document, please?
3 This is what I want to show from Page 13. Can you read the
4 heading?

5 **A.** "DEA was slow to respond to the dramatic increase in
6 opioid abuse and needs to more fully utilize its regulatory
7 authorities and enforcement resources to detect and combat
8 the diversion of controlled substances."

9 **Q.** Can you read the second, the next section?

10 **A.** "We found that DEA did not fully utilize its available
11 regulatory authorities as part of its effort to combat the
12 diversion of pharmaceutical opioids, even as the rate of
13 opioid use and abuse in the United States increased
14 dramatically from 1990 to 2017." Continue?

15 **Q.** Just read the next sentence.

16 **A.** "Due mostly to opioid abuse, the rate of opioid
17 overdose deaths in the United States grew on average by
18 eight percent per year from 1999 through 2013 and by
19 71 percent per year from 2013 through 2017."

20 **Q.** And, finally, the next sentence?

21 **A.** "Yet, from 2003 to 2013 DEA authorized manufacturers to
22 produce substantial amounts of opioids."

23 **Q.** All right. That's fine. Let's turn to Page 31,
24 please. Please read the next section out loud.

25 **A.** "We found that SORS database did not include all

1 suspicious orders provided to DEA, thereby significantly
2 impacting its usefulness. This was due largely to the fact
3 that most DEA registrants are not required to report
4 suspicious orders to DEA headquarters. Instead, consistent
5 with federal regulation, nearly all such information is sent
6 to the DEA field offices and DEA has not created a mechanism
7 whereby reports sent to its field divisions are uploaded
8 into the SORS database." Continue?

9 **Q.** Yeah.

10 **A.** "As of August, 2017, approximately 1,400 DEA
11 registrants were manufacturers and distributors of
12 controlled substances and ARCOS contained ordering
13 information from about 1,100 of these registrants. Yet, we
14 found that the SORS database contained suspicious order
15 reports from only eight registrants."

16 **Q.** All right. Go to the next section on this page. Read
17 the -- read this from -- yeah. Read what's highlighted.

18 **A.** "One diversion program manager described the SORS
19 database as a joke, noting that DEA field division staff did
20 not receive access to the SORS database until 2017, nearly
21 10 years after it was created."

22 **Q.** And one more section on the next page, please, Ritchie.
23 Could you read this section out loud from the Office of
24 Inspector General's report?

25 **A.** "We also believe that DEA should establish regulations,

1 policies, and procedures that specifically define what
2 constitutes a suspicious order, as well as what information
3 should be included in a suspicious order report."

4 **Q.** Okay. Now, the OIG also had a paragraph -- had in its
5 conclusions commented on the setting of quotas. I'd like
6 you to read the first -- I apologize for making you do all
7 this reading. I'm going to stop really soon. Can you just
8 read the first paragraph?

9 **A.** "As the United States is confronted with one of the
10 worst drug epidemics in its history, the opioid related
11 overdoses accounting for more than 47,600 deaths in 2017, an
12 estimated 35 percent of which involved a prescription
13 opioid, we found that DEA was slow to respond to this crisis
14 in a number of ways. First, unlike past drug crises, in
15 combating the current opioid epidemic DEA failed to develop
16 a comprehensive national strategy that could have focused
17 and directed its regulatory and enforcement efforts. For
18 example, as the rate of opioid use and abuse in the United
19 States continued to increase from 1999 to 2016, the amount
20 of opioid manufacturing authorized by DEA also increased
21 dramatically during that same time. We found that DEA did
22 not reduce the aggregate production quota for most
23 controlled substances until 2016, the year during which
24 opioid production fell by 25 percent."

25 **Q.** Thank you.

1 MR. NICHOLAS: I would offer this document into
2 evidence, Your Honor.

3 THE COURT: Any objection?

4 MR. FARRELL: No objection.

5 THE COURT: It's admitted.

6 MR. NICHOLAS: Your Honor, if I -- all I want is
7 30 seconds to talk to these guys. And then that's -- then
8 I'm going to wrap up.

9 (Pause)

10 BY MR. NICHOLAS:

11 **Q.** Mr. Zimmerman, you've been examined on the witness
12 stand for all day today and part of yesterday. You've
13 been with the company for 30 years. And you've spent
14 your life working in the -- working on diversion control
15 and security for AmerisourceBergen.

16 Has the company, in your personal experience, always
17 taken its responsibility for diversion control seriously?

18 **A.** Yes.

19 **Q.** Have you always taken your responsibilities seriously?

20 **A.** Yes.

21 **Q.** You've worked with a lot of people in the company over
22 the years. Many of them you've been with -- some of them
23 for decades.

24 Have the people you've worked with at Amerisource in
25 your experience always taken their responsibilities

1 seriously?

2 **A.** They do. It's a serious job for the industry we're in.

3 **Q.** On a personal level, since you've been here all day and
4 questioned in this fashion, is there anything else that you
5 would like to say to the Court at this time?

6 **A.** Thanks for allowing me to testify. But, you know, I
7 think there's a misnomer that there's -- that we're against
8 DEA in the industry and it's never been that way. We want
9 to -- we're just looking for information to make the best
10 decisions we can.

11 And we understand there's an opioid crisis. Our
12 families -- we have loved ones that have been impacted on
13 both sides, whether there's addiction or death in overdose
14 or through parents with cancer or chronic pain that needed
15 those medications before they pass on.

16 So we understand the magnitude of torturing a
17 legitimate patient by not getting their medication and
18 somebody dying of an overdose. And I just don't want that
19 to get lost. That's why it's so serious when you're making
20 decisions that we don't take them lightly.

21 MR. NICHOLAS: I have no further questions.

22 THE COURT: I have one question, Mr. Zimmerman.
23 I'm probably confused on this. But I thought you testified
24 earlier that you would report suspicious orders and ship
25 them. And then you've testified a while ago that you, you

1 didn't ship them.

2 THE WITNESS: So in 2007 we entered into an
3 agreement with DEA where DEA said we'll enter into an
4 agreement with us to not ship orders.

5 THE COURT: So from now on you haven't shipped?

6 THE WITNESS: Correct.

7 THE COURT: Since 2007?

8 THE WITNESS: Correct.

9 THE COURT: I've got a request here from the
10 plaintiffs that they have a person to put on with Drug
11 Emporium, the custodian, and they've been waiting around all
12 day. And I'd like to accommodate him or her and put them on
13 and get that so they don't have to come back tomorrow.

14 MR. NICHOLAS: I don't object conceptually. I
15 will say that it would be very nice if Mr. Zimmerman does
16 not have to be brought back for another day. So either --
17 if we do this, it's fine. But can we get -- could we get --
18 I don't want to impose on anyone to stay longer than they
19 have to, but I would really like it if he just --

20 THE COURT: Mr. Farrell, how much more are you
21 going to have with Mr. Zimmerman?

22 MR. FARRELL: Hopefully five minutes.

23 THE COURT: Okay. Why don't you go ahead and do
24 that and then we'll take the records custodian.

25 THE WITNESS: Thank you.

1 THE COURT: I didn't ask the other defendants if
2 they need to question Mr. Zimmerman.

3 MR. HESTER: Your Honor, we have no questions.

4 MS. MAINIGI: No questions for us, Your Honor.

5 THE COURT: Okay.

6 REDIRECT EXAMINATION

7 BY MR. FARRELL:

8 Q. Mr. Zimmerman, you were asked about the Defendants'
9 Exhibit DEF-WV-2191. I'm going to try to throw it up
10 and see if I can do this.

11 You read, you read three of the sentences, but not the,
12 the last thing I've highlighted. Would you please -- this
13 is from your DEA joint presentation. Would you please read
14 that into the record?

15 A. Mr. -- starting with "Mr. Mapes"?

16 Q. Well, you can, you can --

17 A. There it is. I'm sorry.

18 Q. "Which include the taking of --" I'm sorry.

19 "Registrants who routinely report suspicious orders,
20 yet fill these orders, with reason to believe they are
21 destined for the illicit market, are failing --" is it my
22 screen?

23 Q. How about if I read it?

24 A. Please. My screen keeps going in and out. Sorry.

25 Q. "Registrants --" oh, man, I need my glasses.

1 "Registrants --"

2 THE COURT: I lost mine too, Mr. Farrell. I have
3 no idea where they are.

4 BY MR. FARRELL:

5 Q. "Registrants who routinely report suspicious
6 orders, yet fill these orders, with reason to believe
7 they are destined for the illicit market, are failing to
8 maintain effective controls against diversion.".

9 Do you trust that I read that accurately?

10 A. Yes.

11 Q. And the record will reflect it. I'm also going to
12 have -- I'm going to quickly circulate and pass these
13 around.

14 MR. FARRELL: This is P-521. Judge, may I
15 approach?

16 THE COURT: Yes.

17 THE WITNESS: Thank you.

18 BY MR. FARRELL:

19 Q. Expediting the matter, you'll recognize this as
20 August 4th, 2007, correspondence from your counsel.
21 It's in follow-up to the July 11th, 2007, letter that
22 was previously admitted. Have you seen this letter
23 before?

24 A. I'm sure I have.

25 Q. Okay. The very last sentence of the second paragraph

1 says, "The agreement does not approve or endorse particular
2 system to identify and disclose suspicious orders. The
3 design and operation of a particular system remains the sole
4 responsibility of ABDC."

5 Did I read that accurately?

6 **A.** Yes.

7 MR. FARRELL: This is Plaintiffs' 521. I'd move
8 for its admission.

9 THE COURT: Any objection?

10 MR. NICHOLAS: No objection.

11 THE COURT: It's admitted.

12 BY MR. FARRELL:

13 **Q.** You said that you read the OIG report that was
14 published in September of 2019. You're aware there were
15 Congressional hearings regarding the sale of pills by
16 five distributors, including AmerisourceBergen, into
17 West Virginia before the House Energy and Commerce
18 Committee, are you not?

19 MR. NICHOLAS: Objection. This is outside the
20 scope.

21 THE COURT: Well, overruled. I'll let him -- I'll
22 let you pursue it, Mr. Farrell. Go ahead.

23 BY MR. FARRELL:

24 **Q.** You're aware of congressional hearings?

25 **A.** I mean, there was congressional hearings, yes.

1 Q. And you're aware that there was a report that was
2 generated that discussed both the DEA as well as the
3 distributors?

4 A. I believe there was a report produced, yes.

5 Q. Have you reviewed the report?

6 A. I'm sure I would have looked at it, but I don't recall
7 it.

8 Q. Did you review the report in the normal course of
9 duties that you performed for --

10 THE COURT: Ms. Mainigi.

11 MS. MAINIGI: I was waiting. Yes, Your Honor. We
12 have an objection to this entire line of questioning. It is
13 clearly outside the scope of the cross-examination or direct
14 examination, whatever we're calling it. But we also have a
15 pending motion on this House E&C issue.

16 THE COURT: Is this the same matter we got into
17 earlier or not?

18 MR. FARRELL: No, Your Honor. To be clear --

19 THE COURT: This is another --

20 MR. NICHOLAS: No, this is the same -- he's
21 raising the same issue again, same matter.

22 MS. MAINIGI: No, no, no, no. To clarify, there's
23 two separate objections. This was not raised -- the House
24 E&C was not raised during the course of the examination by
25 Mr. Nicholas. And that's the primary reason for objection.

1 But I also note and put an objection on the fact that
2 we have a pending motion on the House E&C right now, and the
3 reason for why that should not be admitted into evidence,
4 Your Honor.

5 THE COURT: I'm going to sustain the objection,
6 Mr. Farrell.

7 MR. FARRELL: Judge, I was not attempting to admit
8 the E&C report. I was simply trying to ask the exact same
9 question that I wrote down that Mr. Nicholas asked on the
10 OIG report to lay a foundation that the E&C report would
11 have been reviewed by Mr. Zimmerman.

12 THE COURT: Okay. You can ask him that.

13 BY MR. FARRELL:

14 Q. You said that you had reviewed the House Energy and
15 Commerce report. Correct?

16 A. I probably would have reviewed it, yes.

17 Q. Not probably.

18 A. Well, I don't specifically --

19 MR. NICHOLAS: He said not -- you're correcting
20 what he's saying. I think he's entitled to say what he
21 says.

22 THE COURT: He said, "I probably reviewed it but I
23 don't -- but not -- I don't remember specifically," or
24 something.

25 THE WITNESS: That's correct.

1 THE COURT: Go ahead.

2 BY MR. FARRELL:

3 Q. It's a 450-page report that involves the testimony
4 of your CEO about West Virginia. Is it your testimony
5 you have not reviewed the report?

6 A. I've probably reviewed portions of it. I can't say if
7 I read the whole 450 pages of the report.

8 Q. Would you have done so in your role as Senior Vice
9 President of CSRA at AmerisourceBergen?

10 A. Yes.

11 Q. Last item of inquiry. I'm going to reference
12 Defendants' WV-1. This is the 2007 presentation that you
13 gave along with the DEA. Do you recall this document?

14 A. Yes.

15 Q. I'm going to point you just to two particular things.
16 This is --

17 MR. FARRELL: And I believe this has already been
18 admitted in the record, Madam Clerk?

19 THE CLERK: Yes.

20 BY MR. FARRELL:

21 Q. This is Page 14. Oh, it's over here. If you go to
22 Page 14, do you see the very top item of your -- would
23 you please read it aloud?

24 A. The first arrow or the --

25 Q. Yes, sir.

1 **A.** "If the order quantity goes over the item family
2 threshold, the order will be placed into OMP review."

3 **Q.** And the second one?

4 **A.** "All subsequent orders within the same item family will
5 be rejected while an item within the same family is under
6 review."

7 **Q.** Okay. So let's close the circle on this. The OMP
8 program you would set a threshold or a cap for a pharmacy.
9 And if the orders exceeded that cap, you would start the OMP
10 review and you would hold all other orders until the OMP
11 review finished its logical conclusion. Correct?

12 **A.** For that item, yes.

13 **Q.** All right.

14 MR. FARRELL: Judge, I'd like to have the final
15 document identified as P-432. May I approach?

16 THE WITNESS: Thank you.

17 BY MR. FARRELL:

18 **Q.** Sir, do you recognize this document?

19 **A.** It looks like -- not looks like. It's a memorandum
20 from Ed Hazewski, Kevin Kreutzer, and Joe Tomkiewicz to
21 Chris Zimmerman.

22 **Q.** That would be you, sir?

23 **A.** That's me.

24 **Q.** And the date of it?

25 **A.** January 19th, 2009.

1 MR. FARRELL: Would you please publish it?

2 MR. NICHOLAS: Your Honor, this is outside the
3 scope and I'm going to object to this document. It's not
4 within the scope of my examination at all.

5 MR. FARRELL: Judge, it's --

6 THE COURT: Well, you could have offered it when
7 you called him first, couldn't you, Mr. Farrell?

8 MR. FARRELL: This specifically goes to the
9 program that he just testified to. It specifically goes to
10 the threshold amounts where they are reporting suspicious
11 orders and what their thresholds are --

12 THE COURT: Okay, I'll let you ask him about it.
13 Overruled. Go ahead.

14 BY MR. FARRELL:

15 Q. Do you see the, the limits here on this document,
16 the thresholds?

17 A. Yes.

18 Q. And you'll see that you've identified three pharmacies,
19 a small, medium, and large. Correct?

20 A. Correct.

21 Q. And the oxycodone threshold for the small is 12,000.
22 The medium is 24,000. And the large is 37,000. Do you see
23 that?

24 A. That's what it says, yes.

25 Q. And, so, on an annual basis, that comes to 144,000

1 oxycodone pills a year to small pharmacies; 288,000
2 oxycodones to medium size pharmacies; and 444,000 pills,
3 oxycodone pills to a large pharmacy before your thresholds
4 are even met?

5 MR. NICHOLAS: Well, I'll object only because I
6 don't see any of those numbers on this document.

7 THE COURT: Well, they are on the document, aren't
8 they, Mr. Farrell?

9 MR. FARRELL: Yes, sir. These are, these are
10 pills per month that are on the document. And, so, by
11 taking an annual estimate --

12 MR. NICHOLAS: I apologize. I didn't see them. I
13 thought he was doing math on the fly. I apologize.

14 THE COURT: He's multiplying the numbers by 12,
15 aren't you?

16 MR. FARRELL: Yes, sir.

17 BY MR. FARRELL:

18 **Q.** Is that correct, Mr. Zimmerman?

19 **A.** That's what the memo states.

20 **Q.** And then over on hydrocodone you'll see that the
21 threshold for small pharmacies is 18,000 pills a month. The
22 threshold for medium pharmacies is almost 40,000 pills a
23 month. And the threshold for large pharmacies is 55,000
24 pills a month. Did I read that accurately?

25 **A.** That's what it states.

1 **Q.** So that a small pharmacy customer of AmerisourceBergen
2 could order 350,000 doses of hydrocodone without triggering
3 the thresholds, triggering your OPM process?

4 **A.** According -- I'm looking at this memo.

5 **Q.** And 760,000 dosage units for medium size pharmacies per
6 year without triggering the OMP process?

7 **A.** According to this memo.

8 **Q.** And one million dosage units per year for large
9 pharmacies without -- of hydrocodone without triggering the
10 OMP process. I'm sorry. I made some bad math there.

11 **A.** That sounds a little high.

12 **Q.** I apologize. I'll back up. It's 216,000 for
13 hydrocodone small pharmacies; 480,000 for medium pharmacies;
14 and 660,000 hydrocodone for large pharmacies per year.
15 Correct?

16 **A.** That's what the memo indicates.

17 **Q.** So by adding that all together, a small pharmacy
18 customer of AmerisourceBergen could order 350,000 doses of
19 hydrocodone or oxycodone without ever triggering the OMP
20 process. Agreed?

21 **A.** Potentially.

22 **Q.** And a medium size pharmacy could order 760,000 dosage
23 units of oxycodone and hydrocodone without ever triggering
24 their OMP process. Agreed?

25 **A.** That's what the memo states.

1 Q. And --

2 A. These numbers are in the memo, yes.

3 Q. And a large pharmacy could order over a million pills
4 of hydrocodone and oxycodone a year without ever triggering
5 the OMP process. Agreed?

6 A. That's what the math adds up to.

7 MR. FARRELL: No further questions, Your Honor. I
8 move to admit 432.

9 THE COURT: Any objection to it?

10 MR. NICHOLAS: No objection.

11 MS. MAINIGI: No, Your Honor.

12 THE COURT: All right. It's admitted.

13 May Mr. Zimmerman be excused?

14 MR. FARRELL: Yes, Your Honor.

15 THE COURT: Mr. Zimmerman, thank you very much for
16 being here and your patience with us. You're free to go,
17 sir.

18 Let's get the records custodian in and get that done
19 and then we'll go home.

20 MR. HESTER: Your Honor, while we're waiting, I
21 wanted to see if I could raise one housekeeping matter with
22 the Court.

23 THE COURT: Okay. Go ahead.

24 MR. HESTER: This is for our planning purposes.
25 We, obviously, have known that the Court has allocated six

1 weeks of trial time to the defense and six weeks of trial
2 time to the plaintiffs. And our understanding as we get to
3 the end of week two is that still remains the Court's
4 intention that each side will have 30 days of trial time in
5 the matter?

6 THE COURT: I think that's the plan.

7 MR. HESTER: And we also wanted to make sure we
8 confirmed with the Court that the Memorial Day week, the
9 week from May 31 through June 4, that's an open week.

10 THE COURT: Didn't we decide to open that whole
11 week and not come back? I originally had another trial that
12 week. That's why I was going to have you come back, but it
13 doesn't make any sense for us to be here one day.

14 How are we going to make up that time? Okay. The plan
15 was to make up for that, at least in part, by going a full
16 day on Friday a week from tomorrow.

17 MR. HESTER: Thank you, Your Honor. We can do
18 some work that week when we're not in court. So thank you.

19 THE COURT: I think we'll all be happy to have a
20 whole week off.

21 MR. HESTER: Thank you, Your Honor.

22 MR. MAHADY: No objection, Your Honor.

23 THE COURT: Okay.

24 MR. FULLER: Judge, Mike Fuller on behalf of the
25 plaintiffs. I would like to call Donna Kelley who's a

1 records custodian.

2 THE COURT: All right, you may do so.

3 Ms. Kelley.

4 THE CLERK: Would you please state your name.

5 THE WITNESS: Yes. My name is Donna Kelley. The
6 last name is spelled K-e-l-l-e-y.

7 THE CLERK: Thank you. Please raise your right
8 hand.

9 **DONNA KELLEY, PLAINTIFFS' WITNESS, SWORN**

10 THE CLERK: Thank you. Please take a seat.

11 THE WITNESS: Thank you.

12 DIRECT EXAMINATION

13 BY MR. FULLER:

14 **Q.** Ms. Kelley, I want you to know that's bulletproof
15 glass, so no one can shoot you while you're up there.
16 Okay?

17 **A.** That's good to know.

18 THE COURT: We're sorry we've kept you waiting all
19 this time. That's just one of the aggravations --

20 THE WITNESS: It's perfectly all right.

21 THE COURT: -- we ask people to put up with.

22 BY MR. FULLER:

23 **Q.** Now, Ms. Kelley, you are free to remove your mask
24 now so we can all hear you. And just make sure you
25 speak into the microphone.

1 **A.** Yes, sir.

2 MR. FULLER: May it please the Court.

3 THE COURT: Yes.

4 MR. FULLER: Thank you, Your Honor.

5 BY MR. FULLER:

6 **Q.** Ms. Kelley, state your name for the record.

7 **A.** My name is Donna Kelley.

8 **Q.** Where are you currently employed?

9 **A.** I am employed at Discount Emporium, Inc., doing
10 business as Drug Emporium.

11 **Q.** And you received a subpoena over there at Drug Emporium
12 for this trial; is that correct?

13 **A.** Correct.

14 **Q.** It actually requested certain documents to be brought
15 to trial; is that right?

16 **A.** That's correct.

17 **Q.** And is your role one of the record custodian for Drug
18 Emporium?

19 **A.** Yes, sir.

20 **Q.** And this pharmacy is over in Cabell County; is that
21 correct?

22 **A.** Yes, sir.

23 **Q.** And the records that you've pulled, were they
24 dispensing records?

25 **A.** They were.

1 **Q.** And did you pull records from I think 2011 through 2018
2 for all the prescriptions that the pharmacy filled during
3 that time frame; is that right?

4 **A.** That's correct.

5 **Q.** And did you extract from those records the -- what we
6 would call HIPAA information, anything that would identify
7 the patient --

8 **A.** We did.

9 **Q.** -- or customer?

10 **A.** We did.

11 **Q.** And were these records something that are kept in the
12 normal course of business?

13 **A.** They are, yes.

14 **Q.** Are they inputted by someone with knowledge or
15 conducting the transaction?

16 **A.** Yes.

17 **Q.** And are those records maintained by you in the normal
18 course of your business?

19 **A.** They are, yes, indeed.

20 THE COURT: Are the entries made by your employees
21 made at or near the time of the events that they're
22 reported?

23 THE WITNESS: Yes, Your Honor.

24 THE COURT: Okay.

25 BY MR. FULLER:

1 **Q.** Ms. Kelley, can we pop up one of the Excel
2 spreadsheets?

3 MR. FULLER: Your Honor, this is P-43770 for the
4 record. There's actually seven Excel spread files,
5 spreadsheets.

6 BY MR. FULLER:

7 **Q.** We're just going to go through it real quick,
8 Ms. Kelley. The first column is the date written.
9 That's the date the prescription was written; is that
10 correct?

11 **A.** Yes, that's correct.

12 **Q.** The next column is the date. And that's the date the
13 prescription is filled; is that right?

14 **A.** That is correct, yes.

15 **Q.** The Rx number is the prescription number; is that
16 right?

17 **A.** The prescription number, yes.

18 **Q.** Then we have the quantity, and that's the quantity of
19 pills; is that correct?

20 **A.** I believe so.

21 **Q.** The day supply, how many days the prescription is for;
22 is that right?

23 **A.** Yes.

24 **Q.** Last insurance paid, how it's paid, either by cash or
25 by third party; is that correct?

1	A. Yes.
---	----------------

2 Q. Then you have the drug, the therapeutic class, the
3 doctor's DEA number, and then the doctor who wrote the
4 prescription; is that correct?

5 **A.** That is correct.

6 Q. Is that true for all the records that you provided as
7 far as the dispensing records?

8	A. Yes.
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9 MR. FULLER: Judge, because of the size of the
10 spreadsheets, I have them on a thumb drive. So we would now
11 submit P-43770 for admission.

12 THE COURT: Is there any objection?

13 MS. WICHT: No objection, Your Honor.

14 MR. HESTER: Not from me.

15 MR. NICHOLAS: No objection.

16 THE COURT: May the witness be excused?

17 MR. FULLER: As far as I'm concerned, Your Honor.

18 THE COURT: Ms. Kelley, thank you very much.

19 MS. WICHT: Your Honor, I apologize. I have just
20 two or three questions just to clarify.

21 THE COURT: Oh, I'm sorry. Go ahead, Ms. Wicht.

22 MS. WICHT: I'm sorry. I don't think I'm going to
23 introduce any complications at this hour of the day, Your
24 Honor.

25 CROSS EXAMINATION

1 BY MS. WICHT:

2 Q. Good afternoon, Ms. Kelley. My name is Jennifer
3 Wicht and I'm an attorney for Cardinal Health. I just
4 have two or three questions. I just wanted to clarify.

5 A. Okay.

6 Q. The spreadsheets that were produced and what you just
7 talked about with Mr. Fuller, I just wanted to clarify, does
8 that include all medications that were dispensed by Drug
9 Emporium for that time frame or were there particular
10 medications that were selected and pulled?

11 A. All medications for that location for those date
12 ranges.

13 Q. Okay. For the location in Cabell County?

14 A. In Cabell County.

15 Q. Okay. And the data was not selected or limited
16 depending on what distributor Drug Emporium received those
17 drugs from; correct?

18 A. The records reflect all prescriptions dispensed for
19 that location for those time frames.

20 Q. Okay. Thank you, ma'am. And, and that data was pulled
21 from Drug Emporium's internal recordkeeping system. Am I
22 correct?

23 A. I'm not sure I quite understand your question.

24 Q. Okay. The system that you pulled them from, that's an
25 internal system that Drug Emporium uses to run its business;

1 is that right?

2 **A.** That's correct.

3 **Q.** It's not a system that other companies or -- have
4 access to. Is that right?

5 **A.** That's correct.

6 **Q.** Okay. Thank you very much. That's all I have, ma'am.

7 THE COURT: Anything else?

8 MR. FULLER: No, Your Honor. Just for the record,
9 we've produced copies of the electronic files to the
10 defense. I don't have extra thumb drives, but I'm going to
11 give this one to the clerk.

12 THE COURT: All right.

13 MR. FULLER: Thank you, Judge.

14 THE COURT: Now you can go, Ms. Kelley. Thank you
15 very much.

16 THE WITNESS: Appreciate it.

17 THE COURT: We'll be in recess until 9:00 tomorrow
18 morning.

19 (Trial recessed at 5:06 p.m.)
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25

1 CERTIFICATION:

2 I, Ayme A. Cochran, Official Court
3 Reporter, and I, Lisa A. Cook, Official Court Reporter,
4 certify that the foregoing is a correct transcript from
5 the record of proceedings in the matter of The City of
6 Huntington, et al., Plaintiffs vs. AmerisourceBergen
7 Drug Corporation, et al., Defendants, Civil Action No.
8 3:17-cv-01362 and Civil Action No. 3:17-cv-01665, as
9 reported on May 13, 2021.

10
11 S\Ayme A. Cochran

12 Reporter

13 s\Lisa A. Cook

14 Reporter

15 —

16 May 13, 202117 Date
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